

San Francisco Law Library

No.

Presented by

.....

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

825
824
No. 2281

United States
Circuit Court of Appeals

For the Ninth Circuit.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Eastern District of Washington,
Northern Division.

FILED

AUG 2 - 1913

Records of U.S. Ancient
Count of Appraisals
825

No. 2281

United States
Circuit Court of Appeals

For the Ninth Circuit.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Eastern District of Washington,
Northern Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer	5
Assignments of Error.....	115
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions.....	31
Bond on Writ of Error.....	123
Certificate and Order Allowing and Settling Bill of Exceptions	113
Certificate of Clerk U. S. District Court to Tran- script of Record	130
Citation on Writ of Error.....	126
Complaint	1
Judgment	11
Motion for Judgment Non Obstante Veredicto..	13
Motion for Verdict in Favor of Defendant.....	110
Names and Addresses of Attorneys of Record..	1
Notice of Filing Defendant's Proposed Bill of Exceptions	30
Opinion	21
Order Allowing Writ of Error and Fixing Amount of Bond.....	119

Index.	Page
Order Extending Time to File Bill of Exceptions, etc.	24
Order Extending Time to Prepare, etc., Bill of Exceptions, January 4, 1913, etc.....	25
Order Extending Time to Prepare, etc., Bill of Exceptions to February 10, 1913, etc.....	26
Order Extending Time to Prepare, etc., Bill of Exceptions to May 10, 1913, etc.....	27
Order Extending Time to Prepare, etc., Bill of Exceptions to June 10, 1913, etc.....	29
Order Staying Execution upon Verdict to May 10, 1913, etc.	28
Petition for New Trial	15
Petition for Writ of Error	117
Praecipe for Transcript	128
Reply	9
TESTIMONY ON BEHALF OF PLAINTIFF:	
HARRIS, FREEMAN	89
McCARTHY, DR. H. H.	82
Cross-examination	85
O'CONNELL, CATHERINE M.....	86
Cross-examination	88
O'CONNELL, JOHN JOSEPH.....	35
Cross-examination	59
Redirect Examination	76
Recross-examination	78
O'NEILL, DR. F. W.	80

Index.

Page

**TESTIMONY ON BEHALF OF DEFEND-
ANT:**

LOEHR, JOE	94
Cross-examination....	100
Redirect Examination	109
Verdict	10
Writ of Error	121

Names and Addresses of Attorneys of Record.

CANNON, FERRIS & SWAN, Old National Bank
Building, Spokane Washington,
Attorneys for Plaintiff in Error.

And

ROBINSON & MILLER, Hyde Block, Spokane,
Washington, and

OSCAR CAIN, Federal Bldg., Spokane, Washing-
ton,

Attorneys for Defendant in Error. [1*]

*In the Superior Court of the State of Washington,
for the County of Spokane.*

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of
action alleges:

I.

That at all the times hereinafter mentioned the de-
fendant was a corporation, created, organized and ex-
isting under the laws of the State of Maine, and has

*Page number appearing at foot of page of original certified Record.

complied with the laws of the State of Idaho, relative to foreign corporations doing business therein and owns and operates a lumber manufacturing plant at Potlatch in the State of Idaho, together with cars and appliances used in hauling, and loading logs at its mill and maintains offices and a place of business in the city of Spokane, Washington.

II.

That on the 20th day of January, A. D. 1910, the plaintiff commenced to work for defendant in its green shed and on the pond where logs were stored, and about four or five days prior to the 19th day of February, 1910, was placed at work assisting in unloading logs from cars into the pond, said logs being unloaded by means of cables placed under the logs on the cars and said cable being attached [2] to a crane operated by steam by the side of the car, which when raised on the side of the car next to the crane rolled the logs off of the car and into the pond.

III.

That on said date and a few minutes after 12 o'clock on the morning of said day, plaintiff, under the order and directions of the defendant and the employee in charge of unloading said logs, was assisting in unloading as aforesaid, and after an attempt had been made as aforesaid to unload logs from a car, three logs were left remaining on the car that the cable failed to unload into the pond, that the night was dark and the place was unlighted except from an electric light a long distance away, so that plaintiff was unable to see or know the position of the remaining logs upon the cars and was ordered

and directed by the employee in charge of said unloading to get upon the car with a peevy and roll the said logs from said car. That while plaintiff was attempting to roll said logs from said car, and not knowing of any danger in so doing and being unable, because of the darkness, to see the position of said logs, one thereof rolled upon the end of another which projected over the side of the car, causing the other end thereof to tip up with great force, striking the plaintiff and knocking him into and upon the logs in the pond, mashing, bruising and injuring the left knee, and breaking, bruising and injuring the left foot or instep, and severely lacerating the tendons of his left leg, and the right side of plaintiff's head was severely injured and bruised and his teeth on the right side were jarred loose, and his jaw was injured to such an extent that the nerves thereof have become deadened, and plaintiff's left leg and foot is and will continue to be weak, crooked, sore and crippled, and will continue to be during the [3] remainder of plaintiff's life, and has and will continue to cause him great pain and suffering, as will also plaintiff's teeth and jaw, and plaintiff's left shoulder and back were sprained and he suffered a severe shock to his nervous system, and plaintiff is and has been permanently disabled and incapacitated from following any occupation requiring the exercise of physical strength while upon his feet or lifting.

IV.

That plaintiff at the time of the happening of said accident was of the age of 17 years and inexperienced in this character of work, and entered the em-

ploy of the defendant with the understanding that he was to be engaged in a less hazardous occupation.

V.

That by reason of the negligence and carelessness of the defendant in causing the injuries aforesaid to the plaintiff and the pain and suffering he has endured and will continue to endure, and the loss of his ability to work and the permanency of said injuries, he has been damaged in the sum of \$18,000.00.

VI.

That on the 2d day of October, 1911, by an order duly made and entered in the Superior Court of Spokane County, Washington, Catherine M. O'Connell was appointed the guardian ad litem to represent the plaintiff in this case.

Wherefore, plaintiff prays judgment against the defendant in the sum of Eighteen Thousand Dollars (\$18,000.00), and for his costs and disbursements herein.

(Signed) ROBERSTON & MILLER,

Attorneys for Plaintiff. [4]

State of Washington,
County of Spokane,—ss.

Catherine M. O'Connell, being first duly sworn, on oath deposes and says that she is the duly appointed guardian ad litem of the plaintiff in the above-entitled cause; that she has read the foregoing complaint, knows the contents thereof and that the same is true as she verily believes.

(Signed) Mrs. CATHERINE O'CONNELL.

Subscribed and sworn to before me this 2d day of October, A. D. 1911.

(Signed) FRED MILLER,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Filed Oct. 2, 1911, at 10:00 o'clock A. M. Glenn B. Derbyshire, Clerk. R. S. Knox, Deputy.

[Endorsements]: Complaint—being part of transcript of record on removal from State court to Federal Court.

Filed in the U. S. District Court for the Eastern District of Washington. April 1, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy. [5]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Answer.

Defendant, for answer to the complaint of the plaintiff, alleges:

I.

Admits paragraph I of plaintiff's complaint to be true.

II.

Answering paragraph II, defendant admits that plaintiff entered the employ of the defendant on or about the 20th day of January, 1910, and that on the 19th day of February, 1910, he was engaged in unloading logs from cars into the pond, and, save as admitted, denies each and every allegation, matter and thing in said paragraph II contained.

III.

Answering paragraph III of said complaint, defendant denies each and every allegation, matter and thing therein stated, whether as therein alleged or otherwise, except that it admits that plaintiff was in some manner injured on that night, but it denies that it has any knowledge or information sufficient to form a belief as to the extent of his injuries. [6]

IV.

Answering paragraphs IV and V of said complaint, defendant denies that it has knowledge or information sufficient to form a belief as to any of the matters or things therein stated, and it denies said paragraphs and each of them.

V.

Answering paragraph VI of said complaint, defendant admits that the matters therein stated are true.

FOR A FIRST AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. Alleges that it is a corporation as stated in paragraph I of said complaint, and that it has paid

its last annual license fee due the State of Washington.

2. That at the time stated the injury to plaintiff, if he was injured, was due solely and alone by reason of his own contributory negligence and carelessness in failing to protect himself against the dangers of logs rolling upon him or striking him, though he had ample opportunity to so protect himself, and to get out of the way of rolling logs had he seen fit to do so.

FOR A SECOND AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant alleges:

That if plaintiff's injury was caused by the negligence of anyone except himself, it was caused by the negligence of his associate engaged with him in the work of assisting plaintiff in moving the log in such a manner as to cause the same to strike against the plaintiff or roll upon him.

FOR A THIRD AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant alleges:

That the plaintiff, at the time he entered upon the work in which he was engaged, understood and thoroughly appreciated any and all dangers connected therewith, and fully [7] appreciated the fact that the logs would roll and might injure him if he got in their path, and that in entering upon the work he assumed and took upon himself all dangers and risks incident to his employment, among which were the dangers and risks which he alleges caused the accident.

WHEREFORE, defendant prays that plaintiff

take nothing by this action and that the defendant have judgment for its costs and disbursements herein.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

E. J. Cannon, being first duly sworn, upon oath, deposes and says: That he is one of the attorneys for the Potlatch Lumber Company, a corporation, defendant in the above-entitled action; that he makes this affidavit for and on behalf of said corporation for the reason and upon the ground that none of the officers of said corporation are at present within the county of Spokane, State of Washington, wherein said action is pending; that he has read the foregoing answer, knows the contents thereof and that the same is true as he verily believes.

(Signed) E. J. CANNON.

Subscribed and sworn to before me this 4th day of April, 1912.

[Notarial Seal] G. M. FERRIS,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash. [8]

[Endorsements]: Due service of the within answer by receipt of a true copy thereof admitted this 5th day of April, 1912.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Answer. Filed in the U. S. District Court for the Eastern District of Washington. April 5, 1913. W. H. Hare, Clerk. By S. M. Russell, Deputy. [9]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Reply.

Plaintiff replies to the Answer of the defendant
herein as follows:

I.

Denies each and every allegation and all the allegations of new and affirmative matter in said answer contained.

WHEREFORE: Plaintiff prays judgment as in his complaint.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff. [10]

State of Washington,
County of Spokane,—ss.

Catherine M. O'Connell, being first duly sworn, on her oath deposes and says that she is the guardian at litem of J. J. O'Connell, plaintiff in the above-entitled cause, that she has read the foregoing Reply, knows the contents thereof, and that the same is true as she verily believes.

(Signed) CATHERINE M. O'CONNELL.

Subscribed and sworn to before me this 8 day of April, A. D. 1912.

(Signed) DORA BEACH,
Notary Public in and for the State of Washington,
Residing at Spokane. [11]

[Endorsements]: Due service of the within Reply received this 9th day of April, 1912.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Reply filed in the U. S. District Court for the Eastern District of Washington, April 20, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy. [12]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled case, find for the plaintiff, and assess the amount of his damages at the sum of Three Thousand Five Hundred (\$3500.00) Dollars.

(Signed) W. T. ELLWANGER,
Foreman.

[Endorsements]: Verdict. Filed in the U. S. District Court for the Eastern District of Washington, September 20, 1913. W. H. Hare, Clerk. [13]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Judgment.

This cause coming regularly on for trial on the 20th day of September, A. D. 1912, the plaintiff appearing in person and by his attorneys, Robertson & Miller and Oscar Cain, and the defendant by Cannon, Ferris & Swan, its attorneys, a jury of twelve persons was duly and regularly impaneled and sworn to try said cause, and witnesses were sworn and examined upon behalf of plaintiff and defendant and after argument of counsel and instructions of the Court, the jury retired to consider of its verdict and returning into court on the said 20th day of September, A. D. 1913, found for the plaintiff and against the defendant and assessed the plaintiff's damages at the sum of Three Thousand Five Hundred Dollars (\$3,500). Thereafter the defendant filed its petition for a new trial and motion

for judgment *non obstante veredicto*, and the same having been submitted upon brief, and having been taken under consideration by the Court, and the Court having filed an opinion herein overruling each of said motions, and the Court being fully advised in the premises:

WHEREFORE: It is CONSIDERED, ORDERED and ADJUDGED by the Court that the said petition for new trial and the said motion for judgment *non obstante* [14] *veredicto* be and the same each hereby are overruled. And the plaintiff, by his attorneys, having moved the Court for judgment upon the said verdict and the Court being fully advised in the premises, and it appearing to the Court that the plaintiff is entitled to judgment upon the verdict heretofore rendered herein by the jury on the 20th day of September, A. D. 1912;

WHEREFORE: It is CONSIDERED, ORDERED and ADJUDGED by the Court that the above-named plaintiff do have and recover of and from the defendant the sum of Three Thousand Five Hundred Dollars (\$3,500), together with interest thereon at the legal rate from date hereof until paid, and for plaintiff's costs and disbursements taxed at —— Dollars.

Done in open court this 9th day of April, A. D. 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Service hereof acknowledged this 8th day of April, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Judgment on the Verdict and Order Denying Motion for Judgment *non obstante veredicto* and Petition for New Trial. Filed in the U. S. District Court for the Eastern District of Washington, April 9, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [15]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Motion for Judgment Non Obstante Veredicto.

Comes now the above-named defendant and moves and prays the Court for an order granting to it judgment in its favor and against the plaintiff herein, notwithstanding the verdict rendered in favor of the plaintiff and against the defendant on a former day of the present term of this court, to wit, on the 20th day of September, 1912, because there is no substantial evidence to authorize or justify said verdict or a judgment thereon in behalf of plaintiff and against this defendant, for the reason that the testimony in said case fails to show that defendant was guilty of any negligence whatever in the premises which was in any way the proximate cause of plaintiff's injury; that the evidence introduced on the trial of said

cause shows that the dangers and risks incident to doing the work in which the plaintiff was engaged at the time of the accident were open and obvious and of such a character that plaintiff assumed the same as a matter of law; that the evidence introduced upon the trial of said cause shows that plaintiff was guilty of contributory negligence as a matter of law in attempting to remove the logs from the car without ascertaining whether or not the same could be removed without striking or causing other logs on the car to fall and injure the plaintiff; that the [16] evidence introduced upon the trial of said cause shows conclusively that if plaintiff's injury was caused by and through the negligence of anyone other than himself, it was caused by and through the negligence of his fellow servant, Roy Rudd, for whose negligence the defendant is in no way responsible; that the evidence shows conclusively that plaintiff was at all times fully aware of the conditions of the lighting system furnished by the defendant and continued in the employment with full knowledge of said conditions, and that, therefore, he assumed any and all risks incident to working under those conditions the same being open and apparent; that upon the whole of the testimony introduced in said cause the defendant is entitled to the entry of judgment in its favor.

This motion is made and based upon the records and files in said cause, the minutes of the Court and the stenographic report of the evidence upon the trial of said cause.

In the event this motion is denied, and not other-

wise, then the defendant prays the Court to hear and consider its petition for new trial served and filed herein.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Motion for Judgment *Non Obstante Verdicto*. Filed in the U. S. District Court for the Eastern District of Washington, September 23, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

Due service of the within motion by receipt of a true copy thereof admitted this —— day of September, 1912.

Attorneys for Plaintiff. [17]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Petition for New Trial.

Comes now the above-named defendant and moves the Court to set aside the verdict of the jury rendered herein against it on the 20th day of September, 1912, and the judgment of the Court based

thereon and grant to it a new trial of said cause for the following reasons, to wit:

I.

Because of insufficiency of the evidence to justify said verdict. Defendant alleges the evidence to be insufficient:

(a) There is no substantial evidence to authorize or justify said verdict or judgment thereon in favor of plaintiff and against this defendant in that said evidence fails to show that defendant was guilty of any negligence whatever.

(b) That the evidence introduced in said cause shows conclusively that any and all risks in connection with doing the work in question were open and obvious and that plaintiff with full knowledge of the same assumed said risks and dangers as a matter of law.

(c) That the evidence introduced upon the trial of said cause shows that plaintiff was guilty of contributory negligence as a matter of law in attempting to remove said log from said car in the manner testified to by plaintiff. [18]

(d) That the evidence introduced upon the trial of said cause shows conclusively that if plaintiff's injury was caused by and through the negligence of anyone other than himself, it was caused and brought about by the negligence of his fellow-servant, Roy Rudd.

(e) That upon the whole of the evidence introduced in said cause, defendant is entitled to the entry of final judgment in its favor.

II.

Errors in law occurring at the trial as follows:

(a) The Court erred in denying defendant's motion for a directed verdict made at the close of all the testimony in said cause, for the reason and upon the ground that the plaintiff failed to show that the defendant was guilty of any negligence whatever, which was in any way the proximate cause of his injury, and for the reason that it appeared conclusively from the testimony introduced upon the trial of said cause that any and all risks incident to doing the work in question were open and obvious and readily understood and appreciated by a person of plaintiff's age and capacity, and that with full knowledge of said risks and dangers, plaintiff continued in the service of defendant and thereby assumed the said risks as a matter of law; that upon the testimony introduced in said cause, it appears that plaintiff was guilty of contributory negligence as a matter of law in attempting to remove said log from said car without ascertaining whether or not the same could be removed without causing the other logs upon the car to strike and injure him; that upon the evidence introduced in said cause it appears that if plaintiff was injured by and through the negligence of anyone other than himself, his injury was caused and brought about by and through the negligence of his fellow-servant, Roy Rudd, for whose negligence defendant is not in any way responsible; that it appears from [19] the testimony in said cause that if the defendant was in any way negligent with respect to its lighting system at the point of the ac-

cident; that plaintiff had full knowledge of the fact and assumed the risks incident to that negligence on the part of defendant, if any; that it appears from the testimony in said cause that the work in which plaintiff was engaged was of such a simple character that no instruction or warnings were necessary in order that plaintiff fully understand and comprehend any risks there might be in connection with doing such work.

(b) Error of the Court in refusing to give the following instruction requested by defendant:

“The Court instructs you to return a verdict in favor of the defendant.”

For the reason and upon the grounds stated under subdivision (a) herein.

(c) The Court erred in refusing to give the following instruction requested by defendant:

“The Court instructs you that a servant upon entering the service of a master assumes the risk of the master’s negligence, if any, by continuing in the employment without complaint where that negligence and the risk arising therefrom is obvious or plainly observable and the danger of which is appreciated by him or is clearly apparent.”

for the reasons and upon the grounds stated under subdivision (a) herein.

(d) The Court erred in permitting the plaintiff to testify, over the objection of defendant, that the defendant had failed and neglected to warn or instruct him with reference to his duties and the dangers incident thereto for the reason, and upon the ground

that said testimony was not admissible under the allegations of negligence charged in plaintiff's complaint.

(e) The Court erred in permitting the plaintiff to [20] examine the witness, Joe Loehr, with reference to the warnings and instructions given to the plaintiff, for the reason and upon the ground that said testimony was not admissible under the charge of negligence set forth in plaintiff's complaint herein.

(f) The Court erred in permitting plaintiff to prove the failure of defendant to warn or instruct him with reference to the dangers incident to doing the work without requiring the plaintiff to amend his complaint and set forth an allegation containing said alleged negligence on behalf of the defendant.

III.

Accident and surprise which ordinary prudence could not have guarded against.

IV.

Misconduct of the jury.

V.

Excessive damages appearing to have been given under the influence of passion and prejudice.

VI.

Newly discovered evidence material to the defendant which it could not with reasonable diligence have discovered and produced at the trial.

This motion is made and based upon the pleadings, records and minutes of the court, the stenographic report of the evidence, and the documentary evidence on file herein, and the entire records and files in said cause, as well as the rules of this Court and the stat-

utes of the United States relating to new trial.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. [21]

I hereby certify that the within petition for new trial was by the defendant on this day presented to me for my certificate allowing the same to be filed, and I hereby certify that I allowed the same to be filed.

Dated this 23d day of September, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Due service of the within Petition by receipt of a true copy thereof admitted this 6 day of September, 1912.

Attorneys for Plaintiff.

Petition for New Trial. Filed in the U. S. District Court for the Eastern District of Washington. September 23, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [22]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Opinion.

ROBERTSON & MILLER and OSCAR CAIN,
for Plaintiff.

CANNON, FERRIS & SWAN, for Defendant.

RUDKIN, District Judge.—The Court is by no means satisfied with the correctness of its ruling at the trial, admitting testimony tending to show that the defendant failed to warn the plaintiff of the dangers incident to the particular employment in which he was engaged, at the time of receiving the injuries complained of. If a right of action exists in this case at all, it arises out of the fact that the plaintiff was inexperienced; that the defendant had knowledge of his inexperience, or should have had such knowledge by the exercise of reasonable diligence on its part, and that with such knowledge or means of knowledge it placed the plaintiff at work in a dangerous place without warning him against the dangers which beset him. To present such [23] an issue it must be conceded that the complaint is very loosely and very inartificially drawn. The sole allegation of negligence is contained in its fourth paragraph, which reads as follows:

“That plaintiff at the time of the happening of said accident was of the age of 17 years and inexperienced in this character of work and entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation.”

True, it is alleged in the third paragraph that the night was dark and the place unlighted, except by

one electric light a long distance away; and in the fifth paragraph, that by reason of the negligence and carelessness of the defendant in causing the injuries to the plaintiff he was damaged, etc., but I apprehend the former allegation was inserted simply for the purpose of describing the conditions surrounding the plaintiff at the time of the injury, and the latter is a mere legal conclusion from the other facts set forth in the complaint. If it be urged at this time that the want of light was an independent ground of negligence I presume it will be conceded that the absence of light, at least, was open and apparent, even to an inexperienced youth of seventeen years. By a liberal and forced construction it might be inferred from the averment in the fourth paragraph "that the plaintiff entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation," that the defendant had knowledge of his inexperience, but a failure to warn cannot be spelled out of the complaint by the most latitudinarian rule of construction. However, the foreman in charge [24] of the work was a witness at the trial, and at no stage of the case was there any intimation that a warning had been in fact given. Indeed, the third affirmative defense, "that the plaintiff at the time he entered upon the work in which he was engaged, understood and fully appreciated any and all dangers connected therewith and fully appreciated the fact that the logs would roll and might injure him if he got in their path, and that in entering upon the work he assumed and took upon himself all dangers and risks incident to his employ-

ment, among which were the dangers and risks which he alleges caused the accident," would seem inconsistent with the theory that a warning was given. Under all the circumstances, therefore, I am not prepared to say that the defendant was prejudiced by the ruling complained of.

Nor am I entirely satisfied that the plaintiff did not assume the risk. While the work in which he was engaged was dangerous it was by no means complicated. It was the duty of the plaintiff and a fellow-workman to remove from the cars such loose logs as might be left after the great body of logs had been removed by means of a crane. In the instance in question, three logs remained on the car, scattered about in an irregular and disorderly way. The end of one of these logs extended out beyond the body of the car. The plaintiff threw another log out onto this unsupported end and naturally, if not inevitably, the other end swung around and precipitated him off the car and into the water. It might seem that he should have appreciated this. The laws of gravitation are amongst our earliest conceptions. We can see their effect if we cannot see the force that attracts [25] atom to atom. It seems he should have known that if he threw a log onto the end of the log hanging out over the side of the car that the other end of the log was a dangerous place to remain. Many of the authorities cited by the defendant would seem to support this view of the case, but a jury of twelve men has found to the contrary, and I am not prepared to say that I am so far satisfied that their conclusion is erroneous as to justify me in directing

a judgment for the defendant. The motion for a new trial and the motion for a judgment, notwithstanding the verdict are therefore denied.

[Endorsements]: Opinion. Filed April 7th, 1913.
W. H. Hare, Clerk. [26]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,
Defendant.

Order Extending Time to File Bill of Exceptions, etc.

Upon motion of defendant and good cause being shown therefor,

IT IS HEREBY ORDERED, that said defendant be and it is hereby granted sixty days after date within which to prepare, serve and file its proposed bill of exceptions in the above-entitled cause.

IT IS FURTHER ORDERED, that a stay of execution be, and the same is hereby granted to said defendant upon the verdict and judgment rendered herein upon the 20th day of September, 1912, for said period of sixty days.

Done in open court, this 23d day of Sept., 1912.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions 60 Days from Sept. 23, 1912.

Filed in the U. S. District Court for the Eastern District of Washington. September 23, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [27]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order [Extending Time to Prepare, etc., Bill of Exceptions, January 4, 1913, etc.].

On motion of defendant and good cause being shown therefor,

IT IS HEREBY ORDERED that defendant's time for preparing, serving and filing its proposed bill of exceptions herein, be, and the same is hereby extended until the 4th day of January, 1913; and

IT IS FURTHER ORDERED that a stay of execution be, and the same is hereby granted to said defendant upon the verdict and the judgment entered thereon in this cause upon the 20th day of September, 1912, until the 4th day of January, 1913.

Done in open court this 31st day of October, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions until Jan. 4, 1913. Filed in the U. S. District Court for the Eastern District of Washington, October 3, 1912. W. H. Hare, Clerk.

[28]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

**Order [Extending Time to Prepare, etc., Bill of
Exceptions to February 10, 1913, etc.].**

On motion of defendant and good cause being shown therefor,

IT IS HEREBY ORDERED that defendant's time for preparing, serving and filing its proposed bill of exceptions herein be, and the same is hereby extended until the 10th day of May, 1913, and

IT IS FURTHER ORDERED that a stay of execution be, and the same is hereby granted to said defendant upon the verdict and the judgment entered thereon in this cause upon the 20th day of September, 1912, until the 10th day of February, 1913.

Done in open court this 30th day of December, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions until February 10, 1913. Filed in the U. S. District Court for the Eastern District of Washington, December 30th, 1912. W. H. Hare, Clerk. Frank C. Nash, Deputy. [29]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

**Order [Extending Time to Prepare, etc., Bill of
Exceptions to May 10, 1913, etc.].**

On motion of defendant and good cause being shown therefor,

IT IS HEREBY ORDERED that defendant's time for preparing, serving and filing its proposed bill of exceptions herein be, and the same is hereby extended until the 10th day of May, 1913, and

IT IS FURTHER ORDERED that a stay of execution be, and the same is hereby granted to said defendant upon the verdict and the judgment en-

tered thereon in this cause upon the 20th day of September, 1912, until the 10th day of May, 1913.

Done in open court this 5th day of April, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions until May 10th, 1913. Filed in the U. S. District Court for the Eastern District of Washington, April 5, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [30]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order [Staying Execution upon Verdict to May 10, 1913, etc.].

Upon motion of defendant, it is hereby ordered that a stay of execution be granted upon the verdict and judgment rendered in the above-entitled cause up to and including the 10th day of May, 1913, in order to allow defendant time within which to perfect a writ of error in this case to the Circuit Court of Appeals for the Ninth Judicial Circuit.

Done in open court this 10th day of April, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Staying Execution upon Verdict and Judgment until May 10, 1913. Filed in the U. S. District Court for the Eastern District of Washington, April 10th, 1913. W. H. Hare, Clerk.
[31]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

**Order [Extending Time to Prepare, etc., Bill of
Exceptions to June 10, 1913, etc.].**

Upon motion of defendant, and good cause being shown therefor,

IT IS HEREBY ORDERED, that said defendant be, and it is hereby granted an additional extension of thirty (30) days from and after the 10th day of May, 1913, within which to prepare, serve and file its bill of exceptions in the above-entitled cause, and,

IT IS FURTHER ORDERED that a stay of execution be granted to said defendant upon the verdict and judgment rendered in said cause during said time.

Done in open court this 8th day of May, 1913.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Extending Time for Filing Bill of Exceptions Thirty Days After May 10th, 1913.

Filed in the U. S. District Court for the Eastern District of Washington, May 8, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [32]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Notice of Filing Defendant's Proposed Bill of Exceptions.

To the Above-named Plaintiff, and to Messrs. Robertson & Miller, Your Attorneys:

You and each of you are hereby notified that on the 28th day of May, 1913, the above-named defendant filed in the office of the clerk of the above-entitled court, its proposed Bill of Exceptions of said cause, for use upon writ of error of said cause to the Circuit Court of Appeals, a copy of which proposed bill of exceptions is herewith served upon you.

CANNON, FERRIS & SWAN,

Attorneys for Defendant. [33]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Divi-
sion.*

No. 1319.

Before: Hon. F. H. RUDKIN, Presiding Judge.

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

APPEARANCES:

For the Plaintiff:

Messrs. ROBERTSON & MILLER; Messrs.
CAIN & MACDONALD.

For the Defendant: Messrs. CANNON, FERRIS &
SWAN.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial in the above-entitled court, on Friday, September 20, 1912, before Honorable Frank H. Rudkin, Presiding Judge, the plaintiff being represented by his counsel, Messrs. Robertson & Miller and Messrs. Cain & Macdonald, and the defendant being represented by its counsel, Messrs. Cannon, Ferris & Swan.

WHEREUPON the following proceedings were had:

A jury of twelve men was duly empaneled and sworn to try the case. [34*—2†]

Mr. FERRIS.—If the Court pleases, in the case now on trial, the O'Connell case, the defendant desires to make an application for a continuance upon the ground of the absence of one of the witnesses. It seems that at the time of the accident there was only one witness present with plaintiff, a witness by the name of Roy Rud. He was employed by the defendant almost continuously since the accident and has at all time agreed to come whenever the case was set for trial, and we had every reason to believe that he would do that. It seems, however, that very recently he got into some difficulty up in the lumber camps where he was working, and since that time has been going under an assumed name. I understood from Mr. Cain that the plaintiff was also trying to locate this man. He was the only other witness who was present at the time. We have finally located his present whereabouts and find that he is either in Pendleton or near there, and have word from a man, I think, by the name of Albright, who is a very close friend of his, who is working for the Imperial Company. He knows where his present whereabouts are, and the defendant cannot go to trial at this time without the presence of this witness, and if he were present he would testify that he was employed with the plaintiff in the same kind of work and had been for some days or nights prior

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

to the accident; that the work [35—3] consisted in unloading these logs from the cars and on the night of the accident all the lights which had been furnished by the defendant were burning and in good order, and that in unloading one log from the car when there were some two or three others left on the car, this log in some way hit some other log and swung around and knocked the plaintiff off the car. It seems to me that under that state of facts the defendant should not be compelled to go to trial without this witness. We do not ask that the case go over the term, but feel that we can surely have this witness here inside of a week, and all we ask is that your Honor reset the case for sometime during the present term, allowing us about one week's time in which to get this witness. I am willing, if the other side insists, to file in the shape of an affidavit a statement of the facts that this young man will swear, which I have already in the form of a statement from him, signed by him, although not sworn to.

Mr. ROBERTSON.—I did not get that statement. I was not paying attention because I did not think it had any relation to this case at all. I would like to hear it, what this witness will testify to.

Mr. FERRIS.—He will state that he was employed with the plaintiff doing the same kind of work, and had been for several days or nights previous to the [36—4] accident; that the work consisted of unloading logs from cars; that on the night of the accident they were proceeding to do the work in the same manner that they had been for the several

nights previous, and that at the time of the accident there were some three logs on the car and that he attempted to push one of these off, and that in some way it swung around and hit one of the other logs, and that when he saw this he called to the plaintiff, but the log swung around and struck the other log and pushed the plaintiff off the car. He will testify that the lights were in the condition that they had been for several nights previous to the time they were working there; that it was not necessary for any foreman to be present, and there was not any present at the time of the accident, and that he and the plaintiff fully understood all of their duties in connection with the unloading of the logs.

Mr. ROBERTSON.—In order to save a continuance in this case and in view of the statement of counsel, we will be forced to admit that if that witness was here he would so testify. Of course, the weight and credibility of that admission is a matter—by admitting that I do not understand that we admit the truth of it, but that the witness will so testify.

Mr. FERRIS.—If they will admit that he will so testify, that is all we care for. [37—5]

The COURT.—In order that there may be no misunderstanding as to what the admission amounts to, the application should be reduced to writing, I presume.

Mr. FERRIS.—I have a statement of what the witness claims the facts to be that I will reduce to the form of an affidavit and file.

Mr. ROBERTSON.—I think the statement we have admitted as made, the stenographer can write it

(Testimony of John Joseph O'Connell.)

out and that will be satisfactory to us.

Mr. FERRIS.—Very well, that is entirely satisfactory.

The COURT.—Very well, proceed. [38—6]

Mr. Robertson thereupon made an opening statement to the Court and jury.

Thereupon the following evidence was introduced in behalf of the plaintiff:

[Testimony of John Joseph O'Connell, in His Own Behalf.]

JOHN JOSEPH O'CONNELL, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Mr. O'Connell, please state your name in full to the jury, and sit up and look at these gentlemen over there, please. A. John Joseph O'Connell.

Q. State to the jury whether or not you were in the employ of the defendant, the Potlatch Lumber Company, at the time you complain of having received the injuries that you sue to recover for. A. I was.

Q. How had you been working for them?

A. In Potlatch I had been working somewhere in the neighborhood of a month.

Q. How old were you at that time?

A. 17 years old.

Q. Where were you born, Mr. O'Connell? [39—7]

A. In Helena, Montana.

Q. And where did you pass your life, as near as you can recall—where was your first experience in

(Testimony of John Joseph O'Connell.)

life, the first years of your life passed?

A. The first I can remember anything now about was in Wallace, Idaho.

Q. And how long did you live in Wallace?

A. One year.

Q. Then where did you go?

A. To Lothrop, Montana.

Q. And how long did you live there?

A. Five years.

Q. How old were you in Lothrop when you lived there? A. Thirteen.

Q. What? A. I was twelve years old.

Q. And then where did you go to?

A. To Helena, Montana.

Q. And how long did you stay there?

A. Four months.

Q. Then where did you go? A. Missoula.

Q. How long did you stay there?

A. Something like nine months, I think.

Q. Then where did you go? [40—8]

A. To Logan, Montana.

Q. And how long did you stay there?

A. One year.

Q. And then where did you go?

A. To Harvard, Idaho.

Q. How long did you stay there?

A. Two years.

Q. Then where did you go?

A. I was around Harvard up to the time I went to Potlatch.

Q. I ask that for the purpose of showing the differ-

(Testimony of John Joseph O'Connell.)

ent places, and tell the jury what business your father was in.

A. My father was in the railroad business.

Q. What doing? A. Trackman.

Q. He is still in that business? A. Yes, sir.

Mr. FERRIS.—I object to that as immaterial. I do not see what bearing it has.

The COURT.—He has answered the question.

Mr. FERRIS.—I ask to have it stricken.

Mr. ROBERTSON.—The purpose is simply to show his opportunity and experience.

Mr. FERRIS.—Well, we have no objection; he has answered it. [41—9]

Mr. ROBERTSON.—Q. Please state to the jury, now, how old you were when you went to work.

A. I do not understand.

Q. How old were you when you began to do work?

A. I was a little over 14.

Q. Just tell the jury now as briefly as you can the character of the work you have done from the time you went to work up to the time you were injured.

A. I worked on section work first from June until October, and I did not do anything until February, and I helped my father making ties, and I went to work on the section in May of that year, the next year, and worked until October. Then I worked two months in a store as a clerk, and the next summer I worked on a ranch doing odd jobs, and during the winter before I was hurt I put up ice, that is, before I went to Potlatch.

Q. Just tell the jury what and how you were em-

(Testimony of John Joseph O'Connell.)

ployed to go to Potlatch, who employed you, and what, if anything, was said, about the character of the work you were to do for them.

A. At the time I went to Potlatch I went first to work in the green shed, piling lumber, or taking lumber off of the chain, and I worked there about a week and a half or two weeks, and I laid around some days, and I went to the pond foreman, Joe Lair, I think his name is. I would not say for sure.

[42—10]

Q. Just explain that pond to the jury.

A. What is that?

Q. Did you say you went to the pond?

A. Yes, sir, I went to the pond.

Q. Just explain that pond to the jury, how big it is and what it is used for.

A. A hot pond where they kept logs; they have a sort of a raft there, they have two chutes on it, and they get logs there and send them up the chain into the mill. He hired me to work on the boat as a measurer, measuring logs.

Q. Do they saw the logs off? A. Yes, sir.

Q. Do the logs come in different lengths from the woods? A. Yes, sir; there is some long logs.

Q. What did you do in reference to sawing them?

A. They have blocks they drop down in the water and run a log up against it and hold it there until the man would get his dog on it to hold it while he sawed it.

Q. How long had you been working at that work before the night you were hurt, how many days?

(Testimony of John Joseph O'Connell.)

A. I worked two or three nights there, and two or three nights on the boom.

Q. Did you have any conversation at all with anybody at the time you went to work as to the character of the [43—11] work you were to do?

Mr. FERRIS.—That is objected to on the ground it is immaterial.

Mr. ROBERTSON.—I will show it is material, I think, afterwards.

Mr. FERRIS.—The counsel's opening statement to the effect he was not warned in any way of the dangers, if that is what he is leading up to, is not one of the grounds of negligence pleaded in the complaint, as I read it, and it does not seem to me that this answer can be in any way material.

Mr. CAIN.—It is alleged in the complaint that he was hired to perform a different class of work.

The COURT.—You may answer the question.

(Question read.)

A. I was hired to work on the boat as a measurer, measuring logs.

Mr. ROBERTSON.—Q. Just tell the jury, now, what was said at the time of the hiring by the man who hired you, and tell them who hired you.

A. When I asked him for a job, I asked him for a job working on the boat, and, if I remember right, the first night he said he had nothing except back on the logs. I told him I could not do that, as I had no experience, and the next night, I think it was, he had one man short on the boat or on the boom—on the boat, [44—12] and he put me there measuring,

(Testimony of John Joseph O'Connell.)

and he said that he would be there and I worked there two nights, I think, if I remember right, and then he put me on the boom—that is down further, shoving logs to the chute.

Q. Now, state to the jury whether or not at the time you were shoving the logs in the boom they had been unloaded from the cars.

A. They were unloaded before that.

Q. When you were shoving them into the boom, state to the jury whether or not they were to be moved any distance through the air to any lower place.

Mr. FERRIS.—I object to that on the ground that it is leading. I think the witness should describe the operations there.

Mr. ROBERTSON.—I am willing to do that; I only sought to bring that to his attention. Read the question. (Question read.)

A. No, they were not.

Q. Where were they laid?

A. They were in the water.

Q. Now, when was the first time you went upon any flat cars or any logging cars to move logs from the surface of them?

A. Two nights before I was hurt, I think, is the first time.

Q. And how long had you worked there then?
[45—13]

A. How is that?

Q. How long had you worked the first night?

A. I worked ten hours and a half the first night.

(Testimony of John Joseph O'Connell.)

Q. And the second night?

A. That is, unloading logs?

Q. Yes, sir; I mean unloading logs, how long had you worked at the unloading of logs?

A. Unloading logs, it did not take over an hour and a half to two hours.

Q. And then the next night?

A. About the same time.

Q. And then the night that you were injured, what time did you go to work?

A. I went to work at seven o'clock, I think, if I remember right.

Q. State to the jury what you were doing after you went to work.

A. Up until about 10:30 I was piking logs along through the pond and putting in booms to pull them down, and about 10:30 or a quarter to eleven, I think it was, we started to unload the train.

Q. Tell the jury how you came to start there and what was done.

A. The foreman—when the train pulled in the foreman told me and another man by the name of Roy Rud to pull the logs on the docks, that is, the docks have a trip on them, [46—14] and then when we done that the train came up there.

Q. How many logs would there be on a car?

A. I have no idea how many; it would depend on the size of them.

Q. How? A. It would depend on the size.

Q. That particular night how many log cars came in with that train? A. 27 cars.

(Testimony of John Joseph O'Connell.)

Q. Tell the jury how the logs were unloaded generally.

A. They were unloaded with a steam crane that they had a swing body, and there is two cables on the car. If it was a car of short logs we would first hook on one cable on one end and dump that in, and then the other. If it was a car of long logs, we would hook both cables that were on the car at that time and dump them off.

Q. How would you get the logs to the crane—was the crane stationary or did it move up and down the track?

A. It moved; passed up and down the track.

Q. The crane did? A. Yes, sir.

Q. On what kind of a moving platform—what track was it on?

A. There was a double track there. [47—15]

Q. Was the crane on the car?

A. No, sir; it was on a body of its own.

Q. With wheels? A. Yes, sir.

Q. Like a car? A. Yes, sir.

Q. State to the jury when that train performed its services if ordinarily the logs were all moved off of the flat-cars or not by the crane.

A. They were not. There was times there would be three and four logs stay on a car. Long logs hardly ever stayed on as the cables would throw them all off, but the short logs, they turned all ways.

Q. I will ask you to state to the jury in your own way, Mr. O'Connell, just go on and tell in your own way; first tell them what kind of a night it was.

(Testimony of John Joseph O'Connell.)

A. It was a dark, misty night, cold—I should think about five or six below zero.

Q. And how long had you been working in that weather there? A. How is that?

Q. How long had you been working out there in the open—since you went to work or not?

A. From the time I went to work.

Q. I will ask you to state what was the condition of light at the place where the log was that injured [48—16] you. A. It was very poor.

Q. Well, just tell the jury whether or not it cast sufficient light to furnish you light so you could see to do the work there.

Mr. FERRIS.—We object as calling for a conclusion of the witness. He might describe it, describe how large it was or how light it was.

A. Well, the light must have been off 150 or 200 feet, and the steam from the pond makes a fog around there and the lights were not very good.

Mr. FERRIS.—I did not hear that last.

A. The lights were not very good.

Mr. FERRIS.—I object to the latter part of that as a pure conclusion of the witness. I think that is a question for the jury.

The COURT.—I think it would be hard to describe. I will allow it to stand.

Mr. ROBERTSON.—Q. About the degree of light or darkness at the pond where the logs were, tell the jury so they can understand. Tell the jury so they can understand the amount of light that this electric light threw over to those logs that night at

(Testimony of John Joseph O'Connell.)
the time you were injured.

A. It was not very much light; there was not hardly any light to speak of. [49—17]

Q. And the night, overhead, what was its condition as to being starry or moonlight or what?

A. Well, it was a dark night.

Q. Now, then, tell the jury how you came to move the logs in question.

A. We had passed by there—the foreman came back with us to the side of the car and told us to get up on the car and roll them logs off. We got up there and I stepped on the inside, the other man at the end of the log, and we were trying to get them off.

Q. Sir?

A. We began to get them off. There was small logs on the car pretty near level with the bunks, it was awful slippery and it took us sometime to get the first log started, and when it started we started to move back, and when I started to move the other log hit me across the back and knocking me on my head in the pond.

Q. How did the log that struck you, how did that happen to be moved?

A. By the end of the other log.

Q. Have you got a model here that you could in any way explain this to the jury there and to the Court so that they could understand it better than by you telling them? A. I think I could.

Q. I now hand witness a flat board with six skids [50—18] upon it for the purpose of further testify-

(Testimony of John Joseph O'Connell.)

ing at this time and illustrating the testimony. Now, I wish you would go on in your own way and illustrate what you mean. Just illustrate the whole matter anyway you want to.

A. (Illustrating.) It has the same purchase on there as it has on the other place (indicating), and in the crane drawing this here, it leaves this here straight up; it throws the logs around in all shapes, and the night that I was hurt this cable being on the other end here, it would throw the logs—in other words, this being filled in with snow and this log, if I remember right, was about 16 or 18 feet, and it was held something like that there and caught there, and we tried it and it caught down there on us again, in here, and when it went off it caught the end of that log, and the weight of it being not sufficient to throw that log up and around off the car, this log striking me, I was standing in here, right inside of this bunk, knocking me in the pond on my head.

Q. Now, could you show that night where the cable—if that is not the right place for the cable, you fix it at the right place. Does this plank represent an entire flat-car? A. Yes, sir.

Q. That is, there are six skids on the flat car?

A. Yes, sir, there is six. [51—19]

Q. Now, then, just show the jury now how the entire car would be loaded.

A. Well, it would be loaded something like that (illustrating), but loaded up high here; on this side of the car there is a trip pocket that is worked by a lever along the side, you trip it and a stake drops

(Testimony of John Joseph O'Connell.)
out on each side, on this one and this one.

Q. Were they iron stakes?

A. No, they were wooden stakes with a chain on them, and on this end there is a slide pocket, right there. Then there is a binding put on part way up the load with a hook, on this side, and when the crane comes along and pulls up there on this cable it pulls strong enough that you can knock this hook off and then he will pull this load off.

Q. Ordinarily, when there are long logs, how many of those cables operate on a single pile of logs?

Mr. FERRIS.—That is objected to on the ground it is not material; there is no claim that we did not have the proper cables or anything of that kind, as I understand it.

The COURT.—I see nothing in the complaint charging any defect of the appliances.

Mr. ROBERTSON.—Q. Now, state to the jury why the logs were moved—if the logs were moved or being moved by you and the other young man the same way that they [52—20] would have been unloaded if the cable had worked, that is, from the same side of the car?

Mr. FERRIS.—That is objected to on the ground that it has not any bearing here at all on the issues that I can see. They are really getting at the position that it was negligence in us not to furnish a cable that would take all of these logs off of this car so it would not be necessary for him to take them off.

The COURT.—Yes, there is no charge of any-

(Testimony of John Joseph O'Connell.)

thing of that kind in the complaint, as I read it.

Mr. ROBERTSON.—The charge is that those had been left there by the crane. Now, I think your Honor would hold, whether that crane was good or bad, if they were left there at the time the boy went there it would make no difference. Our contention is that when he was sent there to this particular place under the conditions that the foreman knew about, then whether or not the cable was good or bad would make no difference, the question would be what was the hazard in this particular work and whether or not the place was such a place under the conditions that he had been set to work there—it is not necessary for me to explain my purpose, unless your Honor desires it. The boy has just testified that there were fixed pockets on this side and there were pockets that fell down on the other side (indicating). I was asking him whether or not the logs were moved the same [53—21] way that they would have been unloaded if the cable had worked, to explain what would be the difference.

The COURT.—He has already explained that, but you may proceed.

Mr. ROBERTSON.—Q. Go ahead. I will ask you if you were going to roll the logs off on the same side they had been dumped as if the cable had dumped them off?

A. Yes, sir, we were.

Q. Just explain that to the jury.

A. The pond is on this side, on that side of the car, and when the crane pulls up here they go right over into the pond.

(Testimony of John Joseph O'Connell.)

The COURT.—It seems to me this is pretty largely a repetition.

Mr. ROBERTSON.—The only question is, I think, the boy showed the moving of the logs off on this side.

The COURT.—No, he showed it on the other side.

Mr. ROBERTSON.—Well, if that is understood by the jury. State whether or not at the time you rolled and was working on these logs the light was so that you could see exactly how they laid one with relation to the other. A. I could not.

Q. I will ask you to state whether or not you knew prior to rolling the log off that it would strike the other log in any way. [54—22]

Mr. FERRIS.—If the Court pleases, that is objectionable as calling for a conclusion of the witness.

The COURT.—He may state whether he saw the other logs there.

A. I saw the other logs there, but did not see—that is, did not see the condition they would fall in.

Mr. ROBERTSON.—Q. Or did you know prior to the falling of that log that either of them would or were likely to strike you? A. No, I did not.

Q. I will ask you to state what instructions, if any, were given you by the foreman as to the manner of doing this work.

Mr. FERRIS.—That is objected to on the ground there is no charge in the complaint that we failed to instruct, and from the facts detailed by the witness it is plainly evident that the work was of such a character that no special instructions were necessary.

(Testimony of John Joseph O'Connell.)

Mr. ROBERTSON.—We have authorities on that at the proper time to present in exactly the same shape.

Mr. FERRIS.—I do not think there is any charge in the complaint that we failed to properly instruct. I do not recall any such allegation.

Mr. ROBERTSON.—We aver he was inexperienced and did not understand the nature of the work and they failed to furnish him a safe place. Now, the question [55—23] of instructions becomes competent under that allegation as to inexperience.

The COURT.—The failure to instruct in a case of this kind is the specific act of negligence as a rule.

Mr. FERRIS.—The act of negligence charged in this complaint as I gather it is an inefficient light.

The COURT.—There is more than that charged I do not know whether there is a charge of failure to warn or not.

Mr. ROBERTSON.—Our contention on the construction of the complaint is this, if your Honor please, that this boy was young and inexperienced and placed in a dangerous place by doing this work, without knowledge of the dangers inherent in the work at that time and of insufficient experience to comprehend them, and while so working in this dangerous place, his inexperience being known to the defendant company, he was injured. Now, then, it is entirely competent for us to show that he was not only inexperienced, but that his inexperience had not been taken away from him by any directions. Of course, I think that might be, under this character

(Testimony of John Joseph O'Connell.)

of complaint an affirmative matter that they would have to show in combating the claim of inexperience, that he had been instructed fully. It seems to me it is competent in the first instance to bring it before the jury that he was not instructed or that he was.
[56—24]

The COURT.—In a case of this kind, if I remember the rule correctly, negligence consists of two elements,—one of putting an inexperienced boy to work in a dangerous place, and the other a failure to warn him against the danger. The pleading here charges one but not the other.

Mr. ROBERTSON.—Well, I will ask you Honor to permit this proof and deem the complaint, if your Honor thinks it is not admissible under it, to be amended. I see the foreman here—I am informed that he is, the man who employed him, so there would be no question about that fact.

Mr. FERRIS.—I have not, of course, considered that question and have not in any way talked with the witnesses that might be necessary or who were present at the time this man was employed. It is a matter I have not investigated at all because we did not expect to meet it.

The COURT.—I am inclined to allow the amendment. I am inclined to think it is necessary, but I am not certain, and the other question I will determine afterwards, as to whether or not you will be forced to go to trial. I will allow you to consult with your witnesses, if you desire.

Mr. ROBERTSON.—I will pass that point at

(Testimony of John Joseph O'Connell.)

present with this witness, and place it before the Court, I think, in a way that will make it material.

[57—25]

Q. Did you have any talk with the foreman with reference to what particular method you should pursue in loading those logs?

Mr. FERRIS.—That is the same question, if the court pleases, only another way.

Mr. ROBERTSON.—I think not. That is not the question at all. That is a direction to do the work.

The COURT.—The other objection, of course, goes to the legal sufficiency of the complaint, and I presume we had better determine that question first. I may be in error as to the rule. The rule is, as I stated a while ago, where an inexperienced person is placed to work in a dangerous place two elements go to make up the negligence: first, the fact of his inexperience, and second, the failure to instruct or warn. I think the failure to instruct or warn is a necessary element of your case. If so, of course, it would be necessary to allege it. If you have any authorities to the contrary, I will hear from you.

Mr. ROBERTSON.—I think the other is a broader and better and necessarily, it seems to me, the rule that would apply to this class of cases. While I admit that I urged it without now having the authority that would bear me out in what seems to me to be the rule of reason, and that is this, the law obligates a man to instruct a person who is inexperienced in the work before putting [58—26] him in a dangerous place. Now, his averment that

(Testimony of John Joseph O'Connell.)

he was put to work in a dangerous place while he was of immature intellect it seems to me makes a complete case without regard to whether or not it is alleged that he was or was not instructed, because the allegations of these two conditions place upon the defendant the duty to instruct; it is not necessary for us to aver that to make the testimony admissible.

The COURT.—I was simply keeping on the safe side, Mr. Robertson. If the person who employed this man and the foreman was there at the time was present in court, I do not see why there should be any prejudice in allowing the amendment.

Mr. FERRIS.—We might consult with our witnesses a few moments; it might have been there were other people present; I do not know.

Mr. ROBERTSON.—All right; we have no objection to the consultation.

The COURT.—I may be in error as to the rule, but I know we considered it in the Supreme Court in a great many cases.

Mr. FERRIS.—The witness we have explains that Mr. Rud, who was working with this man in the same kind of work, was an experienced man and that this witness was placed working with Mr. Rud and that Mr. Rud explained to him in detail how these things should be done. [59—27] In our investigation of this case that point has not been anticipated at all, as to what Mr. Rud would testify to, and he is the witness and the only witness to the accident. Now, then, if they make that amendment, unless we can have time to find out the facts from Mr. Rud, we are

(Testimony of John Joseph O'Connell.)

placed in a position of going to trial upon an issue which we are not prepared to meet and which we have not had time to investigate. That is the situation as told to me by the foreman.

Mr. ROBERTSON.—I am not asking now to get the amendment over the objection. Other witnesses are here at this time, but I shall proceed upon the theory that I have been and put in the case and then, as I say to your Honor, either submit the authorities at noon hour here or ask to amend later on.

The COURT.—I will admit the testimony subject to the objection and determine the question later.

Mr. FERRIS.—Very well.

Mr. ROBERTSON.—I think maybe I can even obviate that objection. Of course, I want to do it if I can.

Q. Was or was not or did or did not the foreman show you in what manner the cables should be attached to the logs prior to the happening of your injury, to pull them off the train?

Mr. FERRIS.—That is objected to on the ground it is not within any issue here. There is no charge that we [60—28] did not have the cable properly on those logs.

Mr. ROBERTSON.—I think it is entirely competent to show the orders—under whom he was working there.

The COURT.—The witness may testify as to whether he was warned in any way against the dangers incident to the unloading of these logs, but I think you are getting back of the real ground of the

(Testimony of John Joseph O'Connell.)

negligence in this question.

Mr. FERRIS.—That is subject to our objection?

The COURT.—Yes, sir.

Mr. FERRIS.—Very well.

Mr. ROBERTSON.—Q. State whether or not you talked with the foreman with reference to any danger with reference to removing these logs.

Mr. FERRIS.—I think the witness should be required to state what the foreman told him, if anything.

The COURT.—That is in substance the question he asked.

Mr. ROBERTSON.—Q. Go ahead and state it.

The COURT.—You may answer the question.

A. He told me nothing before, only showed me how to run the cable, and told me to watch for logs coming from the top of the load when I knocked the hook; that was the only instructions he gave me.

Mr. ROBERTSON.—Q. Now, state to the jury what, if anything, you told the foreman with reference to your [61—29] experience.

A. I told him I did not have any experience whatever in that kind of work.

Q. Now, please state to the jury how you were hurt, how badly you were injured and in what manner.

A. Well, my knee was mashed right across here (indicating), and the muscle in front here is broken, and there is something in here that catches me and at times gives me pain; my leg pains me; my leg pains me all the time, even when I lie like that, there

(Testimony of John Joseph O'Connell.)

is a pain right in there, and I cannot stretch it out, that is, right out, I cannot pull it up; I have no purchase on the front of my leg at all, and then I have pains through my head here where I was hit, and right in there especially (indicating).

Q. State about your eyes.

A. And one eye has bothered me a good deal; this one here has been bothering me, and this one here is pretty near shut.

Mr. FERRIS.—If the Court pleases, this last testimony, I do not think there is any allegation of any special damages with reference to the eyes. I may be mistaken about that, however.

Mr. ROBERTSON.—Q. State with reference to your jaws or teeth.

Mr. FERRIS.—Just wait until we settle this question [62—30] here.

The COURT.—I do not think there is anything in the complaint in reference to his eyes. I do not see anything.

Mr. FERRIS.—That testimony then will be stricken.

The COURT.—That will be stricken.

Mr. ROBERTSON.—I think, of course, the right side of his head was severely injured and bruised. Now, the eyes are on the right side of the head, on either side of the head.

The COURT.—You go on and testify the particular nature of the injury, Mr. Robertson. I think you are limited to the specific statement.

Mr. ROBERTSON.—All right.

(Testimony of John Joseph O'Connell.)

Q. State whether or not in any manner your jaw or teeth were injured.

A. My teeth have been bothering me ever since. It killed the nerves or something in them; they went to pieces; there was a dentist told me—

Mr. FERRIS.—Just a moment. We object to what the dentist told you.

Mr. ROBERTSON.—Q. Can you show the jury where that is, where the teeth hurt your head?

A. Right back there (indicating), those back teeth.

Q. Please tell the jury just how this log cut your [63—31] face.

Q. When I went to the hospital I had a cut across there (indicating), one gash across my face, and there is where there is one scar, that is the only one, and then this whole side of my face was all bruised and my nose here was broken.

Q. And I will ask you to state how deep that cut was. A. I could not tell how deep.

Q. Did they sew it up or not?

A. No, they did not sew it up; I don't know what he put on it.

A JUROR.—Your Honor and counsel, may I examine those teeth?

A. I have no objection.

Mr. FERRIS.—I have no objection whatever.

(A juror thereupon examined teeth of witness.)

Mr. ROBERTSON.—Q. Have you been to a dentist since that time?

A. Yes, sir. I was to a dentist here last spring

(Testimony of John Joseph O'Connell.)

and had them all fixed up, that is, all filled and drilled out; he took one out here and one there and then he drilled a hole in another one back there and took the nerve out; it was hurting me.

Q. Built up a tooth on the root?

A. Yes, sir; I wear a crown there; there is a cap [64—32] here, that gold one, and that one is taken out (indicating).

Q. How much were you able to earn before that time—what were you getting?

A. I never earned less than \$2.50 a day.

Q. At the time of the injury what were you getting? A. 25 cents an hour.

Q. What have you to say with reference to the amount of education you have?

A. I did not have very much education—have not.

Q. Prior to that time, state to the jury whether or not you were a ball player.

Mr. FERRIS.—That is objected to on the ground there is no allegation here—

The COURT.—What?

Mr. FERRIS.—A baseball player.

Mr. ROBERTSON.—I am not asking any money for it; I just want to show his activity. That is the only purpose of it.

The COURT.—I think that is sufficiently to the jury; he is an able-bodied boy except for the injury he received.

Mr. ROBERTSON.—Q. State to the jury whether or not since this injury you have endeavored to do any work such as firing on an engine.

(Testimony of John Joseph O'Connell.)

A. I have.

Q. Tell the jury how, if any way, you were affected [65—33] by that injury when performing that work?

A. I went on the Milwaukee, on the next division, I washed engines there for a while, the oil-burners, and they took me out on a coal burner, one of their smallest engines they have, and I worked about three days, about ten tons of coal is about what they burn, and I worked there three days and I had to quit and my leg gave out on me altogether, I could not do anything, I laid around two weeks before I could walk.

Q. Is there any difference in the size of your legs?

A. Yes, sir; it is smaller; the foot is smaller, smaller all the way up and smaller at the knee.

Q. State to the jury whether or not before that time you were active.

A. I was active; I never knew before I was hurt what it was to be tired; I could run all the time, night and day.

Q. And state to the jury with reference to carrying heavy loads of timber and stuff.

A. I could carry heavy loads before I was hurt. Now I cannot. Well, I can carry 50 or 75 pounds, that is, by using it on my right shoulder.

Q. Is your foot getting any better or your leg getting any better? A. It is getting worse.

Mr. ROBERTSON.—Take the witness. [66—34]

(Testimony of John Joseph O'Connell.)

Cross-examination.

(By Mr. FERRIS.)

Q. Now, Mr. O'Connell, just what work have you done since the accident? Start in from the time of the accident and tell us where you were first employed.

A. Well, when I went back to Potlatch I went to catching edgings.

Q. How long after the accident was that?

A. That was on May the 2d or 3d.

Q. May the 2d, and you were injured in February? A. Yes, sir.

Q. About three months, then, after the accident you went back? A. Yes, sir.

Q. You went back catching engines, you say?

A. Catching edgings.

Q. Oh, catching edgings. How long did you work at that? A. I worked two months.

Q. What wages did you receive at that work?

A. \$2.15 a day.

Q. After working there two months, where did you next work? A. The box factory.

Q. That is the same company?

A. Yes, sir. [67—35]

Q. And how long did you work at the box factory?

A. I worked there seven or eight days.

Q. And what were your wages there?

A. Two and a quarter, I think.

Q. Two and a quarter. Where did you next work? A. My next was sweeper.

Q. With the same company?

(Testimony of John Joseph O'Connell.)

A. Yes, sir; in the mill at nights.

Q. How long did you continue in that employment?

A. Well, there could be no definite time set in that, because we only run—

Q. I mean what length of time did you work as a sweeper?

A. Well, I worked there from the 28th day of July up until along towards the last of September; that is, not every night; there was only a night or two at a time they would run; they did not run steady.

Q. Whenever there was any of that work to be done you did it during that time from July to September, as sweeper?

A. Yes, sir; that is, on one end of the mill, the lower end.

Q. What wages did you receive at that work?

A. I think it was \$2.15.

Q. And where were you next employed?

A. I was next employed lathing. [68—36]

Q. The same company? A. No, sir, for Carr.

Q. Where? A. At Potlatch, Idaho.

Q. What kind of work was that? Just what did you have to do? A. Lath.

Q. How long were you employed at that work?

A. I stayed there about ten days.

Q. What were your wages?

A. Two dollars and fifty cents.

Q. And where were you next employed?

A. On the Milwaukee Railroad.

(Testimony of John Joseph O'Connell.)

Q. And how long?

A. I was one month looking after switch lamps.

Q. One month looking after switch lamps?

A. Yes, sir, looking after switch lamps and walking track.

Q. How many switch lamps did you have to look after? A. 21.

Q. And over what distance were they spread?

A. They were spread over within a mile.

Q. In a mile? A. Yes, sir.

Q. What were your duties there—what did you have to do with reference to that? [69—37]

A. Just fill the switch lamps and clean them and see that they were all burning.

Q. How often would you have to make the trip?

A. I would make a trip to fill them once every three days.

Q. Well, to see if they were burning, for instance?

A. I would ride down on the engines to see if they were burning.

Q. When? Every night? A. Yes, sir.

Q. You did not have to walk any working there?

A. No, I did not have to walk; they were switching all the time.

Q. You said something about you were track-walker? A. Yes, sir.

Q. What duties did you have in that?

A. I walked four miles of track one day and came back on the train.

Q. Just walked four miles and rode the other four? A. Yes, sir.

(Testimony of John Joseph O'Connell.)

Q. You did that for a period of about a month?

A. Yes, sir, I did that for about a month.

Q. Where next were you employed?

A. I went then as engine watchman.

Q. When you were track walker or watching these lights what were your wages? [70—38]

A. \$1.65, I think it was.

Q. Now, you say you were watching engines?

A. Yes, sir.

Q. The same company?

A. The same company.

Q. How long?

A. I worked from the 3d day of December until the 1st day of January.

Q. About a month? A. Yes, sir.

Q. What did you have to do there?

A. I had practically nothing to do only just look after the engines, keep water in it.

Q. That was night work, was it?

A. Yes, sir; 12 hours.

Q. What were your wages there?

A. Two dollars.

Q. That is the 1st of January, 1912?

A. No, sir, the 1st of January, 1911.

Q. 1911. That is a year ago last January?

A. Yes, sir.

Q. After January 1st, 1911, where did you first work? A. Three days firing engines.

Q. That is the three days you have testified to?

A. Yes, sir. [71—39]

Q. Where you had to quit on account of the heavy

(Testimony of John Joseph O'Connell.)

work? A. Yes, sir.

Q. Where next did you work?

A. They put me watching oil-burners at the helper station.

Q. How long were you there?

A. I stayed there for three days and then I laid off until the 16th.

Q. Of January?

A. Yes, sir, and then I went watching the oil-burners and stayed there until the 18th of March.

Q. That was for the Milwaukee? A. Yes, sir.

Q. What were your duties there—what did you have to do?

A. Just to watch the engines, keep a little fire and steam up.

Q. That was night work, too, was it?

A. Yes, sir.

Q. What were your wages? A. Two dollars.

Q. After that where were you next employed?

A. The next employment was for the Spokane & Inland.

Q. And when did you commence to work for them? [72—40]

A. I commenced to work for them on July 20th, 1911.

Q. And what work were you doing for the Inland?

A. Clerk in the purchasing department.

Q. How long were you there?

A. I am still there.

Q. And what wages?

A. Sixty dollars a month.

(Testimony of John Joseph O'Connell.)

Q. That has been your wages ever since July, 1911, sixty dollars a month? A. Yes, sir.

Q. You did not have any employment between March and July, of 1911? A. No, sir.

Q. What did you do during that time?

A. Which time?

Q. March and July, 1911.

A. Staying around home.

Q. How many nights were you employed unloading these logs prior to the accident?

A. I could not say whether it was two or three nights.

Q. But it was several nights anyway prior to the night of the accident?

A. It was not over four nights.

Q. Not over four?

A. No, sir, to my knowledge it was not only the [73—41] third night.

Q. Well, you had worked there anyway at least two or three, possibly four, nights prior to the accident; you are not sure of the exact number, but anyway two or three? A. Yes, sir.

Q. How long would these trains usually be, how many cars would there usually be in them?

A. Well, the night before I got hurt there was 26 cars, and the night I was hurt there was 27.

Q. There was about the average string then the night you got hurt? A. Yes, sir.

Q. Then, as I understood you, the crane first unloaded all the logs that would come off with the cable? A. Yes, sir.

(Testimony of John Joseph O'Connell.)

Q. Who handled this train in the handling of the logs? A. Whittie West.

Q. Whittie West? A. Yes, sir.

Q. Did he do that all alone?

A. There was another man with him that night.

Q. What is it?

A. There was another man with him that night; I cannot recall his name. [74—42]

Q. Who attached the chain to the cable so that they could unload them—did you have anything to do with that? A. Rud. and I attached it.

Q. So that you assisted in getting the logs off that would come off with the cable? A. Yes, sir.

Q. And you had been doing that for the two or three nights prior to the accident? A. Yes, sir.

Q. And how long would it take you to remove the logs that were left on the cars, on the string of cars after the cable had taken off those that it did take off?

A. It just depended on how many short logs we had.

Q. Well, on the night of the accident how many cars of short logs did you have? A. Two, I think.

Q. Had you unloaded the other car that had any short logs on it prior to the accident?

A. I think there was one log left upon it.

Q. One log left on it. Had you taken any off of it?

A. We had loaded what the crane would take off. I could not say whether we rolled that other one off or not, but there was only two cars that night.

[75—43]

(Testimony of John Joseph O'Connell.)

Q. The crane unloaded all the others?

A. Yes, sir.

Q. This car upon which you were working at the time of the accident, how many logs were there on that car? A. Three.

Q. And what approximately were the dimensions?

A. I think they was a foot and a half, one of them, and one twelve; two of them twelve inches, I think, I should judge.

Q. How were those logs laying upon the car—will you illustrate there to the jury with three of those sticks?

A. (Illustrating.) These ain't long enough; they ain't the right shape. Something in that shape.

Q. How did you come to start to unload the log that you were working on at the time of the accident—how did you come to start on that log?

A. I could not tell you how we did come to start to unload it. I was told to get up there and unload them logs.

Q. Yes; and you were doing that at the time?

A. Yes, sir.

Q. Now, on which end of that log and whereabouts were you? A. Right in here some place.

Q. And where was Mr. Rud? [76—44]

A. Out here (indicating).

Q. And what were you doing?

A. I was rolling on the log.

Q. Well, what with? A. A cant-hook.

Q. Just explain to the jury what a cant-hook is.

A. Well, a cant-hook is about six feet long, a

(Testimony of John Joseph O'Connell.)

handle on it with a point on it and a hook.

Q. How did you use it to move the log?

A. The hook is catched on here and you get the pry from the top of it.

Q. What was Mr. Rud doing?

A. He was working there with me—that is—

Q. With a cant-hook, too?

A. Yes, he had a peavy.

Q. You each had a peavy or a cant-hook?

A. Yes, sir.

Q. Did you know how many logs were on that car?

A. I could not say whether there was three or four for sure.

Q. How do you know that the logs were lying in that position?

A. They were usually in that position, or something down like (indicating).

Q. How do you know that?

A. What? [77—45]

Q. How do you know that?

A. Well, I took a glance at them is all I have a recollection of.

Q. In other words, you took a look at the logs and decided you would unload that one you have up there on the edge; is not that a fact?

A. I did not decide; I was told to.

Q. Who told you? A. The foreman.

Q. And he did not tell you to unload that particular one first, did he? A. Yes, sir.

Q. He pointed that one out to you?

A. He says, "Get them logs off of there and that

(Testimony of John Joseph O'Connell.)

one over on the other side will come off first.

Q. He said, "That will come off first."

A. Yes, sir; that is what I understood him to the best of my knowledge.

Q. Where were you then?

A. I was on the ground on this side (indicating).

Q. Where was he? A. He was with us.

Q. Where was Mr. Rud?

A. He was there thereabouts.

Q. You were all on the ground?

A. Yes, sir. [78—46]

Q. Then what did you do?

A. We crawls up on the car.

Q. Did you look at any of the logs when you got up on the car? A. Which way do you mean?

Q. Did you look to see how many logs there were or how they were lying?

A. I did not see how many there were, not at all.

Q. Did you notice how they were lying?

A. Not any particular way, only that is the way (indicating). I would not say whether there was three or four logs, but something like that they were lying (indicating).

Q. This log that you attempted to roll off, how long did you say that was?

A. I could not say to the length of that log.

Q. Well, approximately. A. Sixteen feet.

Q. Sixteen feet. Now, the other two that you have there.

A. One eighteen and maybe the other is sixteen. I could not say.

(Testimony of John Joseph O'Connell.)

Q. Eighteen or sixteen, you think. And you say there was snow and ice on the car. A. Yes, sir.

Q. How did you know that? [79—47]

A. Because all the cars had snow and ice on them.

Q. Did you see any on this car? A. Yes, sir.

Q. You could see that, could you?

A. No, we could feel it.

Q. Well, could you see it?

A. I could not say that I could see the snow; there was bark, snow, slippery, and it was filled up at the top, at the bunks, that is, we could not tell exactly where the bunks was, this bunk here especially.

Q. On account of the snow and ice?

A. Snow, bark and ice, I suppose.

Q. Was there bark on the car?

A. I could not say; most of them there was.

Q. Was there on this particular car?

A. I could not say.

Q. You do not know whether there was any bark there or not. Did you look to see?

A. No, I did not.

Q. Who took hold of this log first when you got on the car?

A. I could not say who took hold of it first, whether it was me or Mr. Rud.

Q. Who got on the car first?

A. That I could not say.

Q. Now, on the evening before the accident how many [80—48] cars had you unloaded with logs lying on them after the crane had removed some?

A. Two or three.

(Testimony of John Joseph O'Connell.)

Q. And the evening before that.

A. I do not think there was any the evening before that.

Q. Then you only unloaded cars on one evening before the accident?

A. Well, I do not think there was any short logs if I unloaded any more. I cannot remember any logs being on cars, if there was.

Q. And how were the logs lying on the cars that night?

A. They were lying in a position something like that, across like that (illustrating); maybe one or two, I could not say which.

Q. And you rolled them off with Mr. Rud, did you?

A. Yes, sir.

Q. Where with reference to the cars on which you were working was the light located and in which direction?

A. Somewhere over in this direction, back here, down this way (indicating).

Q. And how far?

A. Oh, one hundred or one hundred and fifty feet from where we were.

Q. And what kind of a light was it? [81—49]

A. It was an arc-lamp.

Q. How large? A. I could not say.

Q. Well, was it as large as one of the street arc-lights?

A. No, sir, it did not give as much light as these street lamps here.

Q. It was almost as large an arc-light, though.

(Testimony of John Joseph O'Connell.)

Weren't they as large as these in size, I mean?

A. I could not say.

Q. How far was the next light?

A. I could not say.

Q. Approximately, about? A. 150 feet.

Q. Were there lights located at different points about 150 feet apart, do you think?

A. Maybe 200 feet, I think; I could not say for sure how far.

Q. Every so often there was an arc light the same as the one that was located 150 feet or thereabouts from the car? A. Yes, sir.

Q. Isn't it a fact that there were lights up and down both sides of this pond you speak of?

A. No, there is no lights on this side of the pond (indicating), or was not at that time. [82—50]

Q. Where were they?

A. They were back along the track somewhere over here (indicating).

Q. So that the cars would be between the lights and the pond? A. Yes, sir.

Q. And you think about 150 feet away from the cars?

A. I think it was over this way about 150 feet.

Q. Was there any lights in this direction, towards me, from where you were? A. I could not say.

Q. Don't you know whether there were lights down that way or not?

A. We were pretty well up towards the other end of the pond. I could not say whether there was another one there or not.

(Testimony of John Joseph O'Connell.)

Q. You would not say whether there was or was not? A. No.

Q. I think you may sit down now. How long was it prior to the time you started to throw the logs off that you had taken them off with the cable, taken the others off?

A. Well, that may be a half hour, maybe three-quarters.

Q. The cable, as I understood you, was around the logs so that it made a sort of a bundle, we might say.

[83—51] A. No, sir, it was not.

Q. As I understood your explanation, you had all of these fixed in such a way that when the cable raised up it threw all of those off except the short ones—

A. Now, the logs are loaded on the car—that there is supposed to represent a car, and I don't remember ever seeing short logs; they may be on top; but I don't remember seeing any short logs loaded with long logs.

Q. That is not what I am asking you. I am asking you if the cable, when you start to unload is not around all the logs? A. It is underneath the logs.

Q. It is underneath all of them? A. Yes, sir.

Q. Now, then, the force is applied in such a way that the cable—the force is applied in such a way that it pulls that cable straight up, is all.

Q. And raises all the logs with it and all of them go off, if I understand you, except those pieces that are so short that they fall off; that is the fact.

A. Yes, sir; slide either way.

(Testimony of John Joseph O'Connell.)

Q. You helped, did you, to unload the logs from this car with a cable that night?

A. Yes, sir, I did.

Q. And the cable was under all the logs on the car? [84—52] A. Yes, sir.

Q. But in raising the logs and in taking them off three were too short and fell out from under the cable and remained on the car? A. Yes, sir.

Q. How many minutes would you say that was prior to the time you came back to unload those three logs?

The COURT.—He said about half an hour awhile ago.

Mr. FERRIS.—Very well.

Q. You think it was about half an hour to your best judgment? A. I should think so.

Q. You were fully aware of the fact, weren't you, Mr. O'Connell, that if that log in rolling off hit the end of another that it might possibly fly around and hit somebody?

A. No, sir, I was not aware of the fact.

Q. You did not know that then?

A. No, sir, I did not.

Q. You did not know that if one body such as a log, would strike another on the end that possibly it might fly up and hit you; you did not know that?

A. No, sir, I did not.

Q. What did you think would happen if this log in falling off struck the end of another log?

A. I did not think it could fall off; that is, [85—53] I thought it would roll straight off, would have

(Testimony of John Joseph O'Connell.)

been my opinion of it.

Q. You thought it would roll straight off? You did not go to the end of these logs to examine which were on top or which were underneath, did you?

A. No, sir.

Q. You could see that from where you stood right here, couldn't you?

A. I was not far from the end of the logs.

Q. You were not over six or eight feet, were you?

A. Not much more.

Q. And you could see whether this was on top or underneath, couldn't you, from where you stood?

A. That is why I could not give you a definite answer a minute ago on the length of that log, for I could not see the end of it.

Q. You mean to say from where you stood there you could not see six or eight feet?

A. You could see black, that is all, the log.

Q. You could see the black log?

A. Yes, sir, you could not see the end of it out where it stuck over the car.

Q. You could not see that it had snow underneath?

A. In some places.

Q. But you could not see from where you were standing to the end of this log six or eight feet away? A. You could see the log. [86—54]

Q. Could you see whether this log was on top or underneath?

A. I would not say whether it was on top, but I don't think it was underneath.

Q. As a matter of fact, you did not pay much at-

(Testimony of John Joseph O'Connell.)

tention, did you? A. No, sir.

Q. You did not look to see whether it was on top or underneath? A. No, sir.

Q. You just went ahead and started to roll it off?

A. Yes, sir.

Q. And that is the way you had done with any other log that you had rolled off while you had been there? A. Yes, sir.

Q. There was nothing unusual about the rolling off of this log at all, was there?

A. No, sir; I was just told to roll it off and I rolled it off according to instructions.

Q. How far away was the pond, Mr. O'Connell, from the car where you rolled these logs off?

A. Right down straight from the end of the bunks.

Q. About how many feet? A. You mean down?

Q. Yes.

A. Maybe six or eight feet. [87—55]

Q. Could you see the water in that pond that night? A. No, sir, I could not.

Q. What was the position of the car on which you were working with reference to whether or not it was level or slanted in either direction?

A. I could not say.

Q. Now, isn't it a fact that the car or the track there was built in such a way that it slanted toward the pond on the pond side?

A. In some places it was, and others it was not.

Q. And you do not know whether this was one of the places it was or was not?

A. No, sir, I do not.

(Testimony of John Joseph O'Connell.)

Q. Which end of the pond were you nearer?

A. I was up towards the upper end.

Q. The upper end of the pond? A. Yes, sir.

Q. That is the end farthest from the mill?

A. Yes, sir.

Q. And how near the end were you?

A. I could not say.

Q. Well, you were considerably past the middle of the pond? A. Yes, sir.

Q. And up pretty well to the end, you think?

A. Yes, sir.

Q. I think that you have covered this, as I [88—56] recall it, you stated that you had unloaded all the cars with the cable before you came back to get these that were short.

Mr. ROBERTSON.—That was not quite the statement that he had done it.

Mr. FERRIS.—Q. I understood that you had completed the operation, you and the men that were working with you, of unloading all the cars so far as the cable would unload them? A. Yes, sir.

Mr. FERRIS.—I think that is all.

Redirect Examination.

(By Mr. ROBERTSON.)

Q. I will ask you to state what were the wages of a fireman? A. The wages of a fireman?

Q. Yes, sir.

Mr. FERRIS.—That is objected to on the ground it is immaterial.

Mr. ROBERTSON.—I want the employment that he tried to follow and could not get the employment

(Testimony of John Joseph O'Connell.)
that he could follow.

The COURT.—I think that is rather remote.

Mr. ROBERTSON.—Q. State to the jury whether or not that knee of yours does or does not swell.

A. If I walk around on it, say, two or three hours, [89—57] or try to run a block, I can take and feel this bandage that I wear on it all the time tight. When I get up in the morning now it will show a hollow, right around in there, through there, it is hollow; you can see a cord back here; at night when I get to bed that is all filled in, swelled up.

Q. Did you have any examination by Mr. O'Neill the other day? A. Yes, sir, I did.

Q. Was your leg then swelled or not?

A. It was a little swelled at that time.

Q. What was that due to? A. From walking.

Q. And when you walked up and down the track state to the jury whether or not you had any pain doing that work or not. A. At that time?

Q. Yes.

A. No, sir, I had no pain no time that I can remember before that.

Q. Have you walked the track since that time, since your injury, have you walked the track?

A. Yes, sir.

Q. State to the jury whether or not in walking the track since the injury you had any pain.

A. I have pains all the time; that is, through in [90—58] there, and at times if I step on a little stone or something and turn my foot it will catch me in the knee here, a sharp pain.

(Testimony of John Joseph O'Connell.)

Q. Do you have to limp at any time?

A. Yes, sir, I limp all the time.

Q. How old was the man that was working with you?

Mr. FERRIS.—I object to that on the ground it is immaterial. There is no charge of incompetent servants there.

The COURT.—He may answer it.

A. I should judge about twenty years old.

Mr. ROBERTSON.—Q. Did you have anything to do in the way of directing the way in which the logs were pulled off by the crane or not?

A. No, sir, I had not.

Q. Or where the crane would come to pull them off, did you have anything to do with that?

A. No, sir, I did not.

Mr. ROBERTSON.—That is all.

Recross-examination.

(By Mr. FERRIS.)

Q. There is one question that I overlooked that I would like to ask. The lights were burning the same on the night of the accident that they had been the nights previous. I mean, the same number of lights were there [91—59] that night that they usually had.

A. If I remember right, there was one light down.

Q. Where was this light?

A. I could not state right the exact spot, but there was one light down.

Q. Was it anywhere near this car?

A. It could not have been far away from it.

(Testimony of John Joseph O'Connell.)

Q. How far?

A. I would not say which light it was, but there was one down.

Q. Was it further away than this one you saw, say 150 feet? A. Yes, sir.

Q. It was further away? A. Yes, sir.

Q. How much further? A. I could not tell you.

Q. How do you know it was down?

A. Because the man came and put it out; the rope had broke.

Q. How far distant was that from the train you were working on—these cars?

A. It was 100 feet, that is, from the train of cars.

Q. I mean the car you were working on?

A. I have no idea.

Q. Was it 300 feet? [92—60]

A. It might have been.

Q. You don't know exactly just where it was, though? A. No.

Q. In your work on the section, what did that work consist of? A. Tamping ties.

Q. Did you have to unload ties from time to time?

A. No, sir, I did not.

Q. Did you have to load any?

A. No, sir, I did not.

Q. Did you have to unload rails from time to time?

A. No, sir, I did not.

Q. Just tamped ties? A. Tamped ties.

Mr. FERRIS.—I think that is all.

Mr. ROBERTSON.—Q. Were you there since the

(Testimony of John Joseph O'Connell.)

accident to know whether the lights were different or not?

Mr. FERRIS.—That is objected to on the ground it is clearly inadmissible.

The COURT.—I sustain the objection.

Mr. ROBERTSON.—That is all.

Witness excused. [93—61]

[Testimony of Dr. F. W. O'Neill, for Plaintiff.]

Dr. F. W. O'NEILL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Please state your name to the jury.

A. F. W. O'Neill.

Q. What is your business?

A. Physician and surgeon.

Mr. FERRIS.—We do not question the doctor's qualifications.

Mr. ROBERTSON.—Q. Did you see this young man here, the plaintiff in this action, at any time prior to coming on the witness-stand?

A. Yes, sir.

Q. When?

A. Saturday evening—last Saturday evening.

Q. Did you make any examination of his leg and of his body generally? A. I did.

Q. I wish you would state to the jury the condition of this boy's legs and muscles and foot as you observed.

A. I made a complete physical examination and

(Testimony of Dr. F. W. O'Neill.)

found [94—62] him all right except for this knee, which at that time he was wearing an elastic bandage on. I had him remove it, and the knee was considerably swollen; also, there was some deformity, the knee being bent in. He was not able entirely to extend the leg; that is, get it up straight that way (indicating). He could get it up about that far; that was as far as it would go. The measurements of the leg showed the knee to be nearly twice the circumference of the other knee. The muscles below the knee were smaller than those of the other leg. Those were the symptoms which I was able to elicit myself. There were several subjective symptoms, among which was pains, especially after using the leg for any length of time, inability to stay on it for any length of time on account of pain; the large amount of swelling which would ensue when he was on it for any length of time, and he also complained of headaches, inability to sleep as well as he used to and a certain amount of nervousness.

Q. I will ask you to state, Doctor, assuming this boy was a strong, robust and healthy boy of seventeen years of age, that was struck by a log and thrown from a car down on some logs and injured in his knee, that having taken place more than two years ago, and since that time he had been able to do some work of a lighter character, not lifting heavily upon his leg, and even [95—63] that work when he walked much he suffered from his knee, and his knee is in a condition that you saw it, state to the jury whether or not that condition

(Testimony of Dr. F. W. O'Neill.)

could arise from an injury just as I have indicated it could, and in conjunction assuming that he did receive that injury and he was in a condition that you saw him, state to the jury whether in your opinion he will recover the complete use of his leg and knee.

A. I should say two years having elapsed that there would be no further improvement.

Q. I will ask you to state whether or not such injuries as you have observed on this boy, such conditions as you have observed, are usually accompanied by pain in using the limb in the ordinary walking and matters of that kind? A. Yes.

Q. That is, is the injury to the knee joint painful?

A. Yes, sir.

Mr. ROBERTSON.—That is all.

Mr. FERRIS.—I do not think we care to ask the Doctor any questions.

Witness excused. [96—64]

[**Testimony of Dr. H. H. McCarthy, for Plaintiff.**]

Dr. H. H. McCARTHY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Please state your name to the jury.

A. H. H. McCarthy.

Q. How long have you been a resident of the city of Spokane, Doctor? A. Seven years.

Mr. FERRIS.—We admit his qualifications.

Mr. ROBERTSON.—Q. State to the jury, Doctor, if you saw this young gentleman, when and where

(Testimony of Dr. H. H. McCarthy.)

and what his condition was.

A. I saw him on the 17th of September. He came to my office and I examined him, took the history of his accident and made an examination of his knee. At that time there was very little swelling in the knee. He told me that it used to swell a great deal towards the close of the day when he used his foot and did a great deal of walking. I noted the muscles below the knee. The leg is about a half an inch smaller, the left leg than the right leg. The leg cannot be extended completely; there seems to be a repression of motion, the forward extension. He says it causes him a great [97—65] deal of pain when you attempt to extend it, and the knee seems to be bowed inward so that the leg is not in straight alignment, as much so as the right leg is.

Q. Can you show that condition by an examination of the boy's leg to the jury, Doctor?

A. Yes, if he removes his clothing.

Q. (Addressing the plaintiff.) Step up there.

The COURT.—Do you want to expose the limb, Mr. Robertson?

Mr. ROBERTSON.—Yes, I think so, if the Court pleases; there is nothing gruesome about it, just to show the muscles.

A. I think it cannot be shown satisfactorily without dropping the clothing down.

Mr. ROBERTSON.—We will do the best we can without it.

A. (Exhibited leg to jury.) This is the injury. It is not so noticeable with his clothing. It pushes

(Testimony of Dr. H. H. McCarthy.)

inward more than this one and this is larger than the other. It seems the flexion is good, but the extension is—does that hurt you? (Illustrating.)

Mr. O'CONNELL (The Plaintiff).—Yes, sir.

The WITNESS.—This one is normal. You will notice the condition on the side of the knee here, especially the head of the tibia. [98—66]

Mr. ROBERTSON.—Q. Doctor, from your examination of this plaintiff, I will ask you to state if in addition to your examination, if you heard the question propounded to Dr. O'Neill. A. Yes, sir.

Q. Now, state if the facts are such as I have indicated to you, in your opinion that the condition of that knee would be apt to arise or would arise from the injury that I have indicated to you that he sustained. A. Yes, sir.

Mr. FERRIS.—There is no claim by us that he was not injured.

The COURT.—That seems to be admitted.

Mr. ROBERTSON.—I will ask you to state, Doctor, if you consider that condition permanent?

A. Yes, sir, I think after the length of time it has lasted, two years, or nearly two, that there will be little or no improvement.

Q. State to the jury whether or not that condition has evidenced in that knee would in your opinion impair his power to work as a bridge carpenter or in any work where a man required strength or as a logger, or anything of that kind where a man was required to put all of his weight or load on one leg as well as the other.

(Testimony of Dr. H. H. McCarthy.)

Mr. FERRIS.—I think the jury are competent to pass on that. [99—67]

Mr. ROBERTSON.—I think so too, but I just asked whether or not outside of the investigation there would be any physical condition that the doctor observed which in his opinion would indicate to him that it would or would not impair his capacity to do that class of work.

The COURT.—You may answer the question, Doctor.

A. Yes, sir, I think it will impair his capacity.

Mr. ROBERTSON.—Q. To what extent, Doctor?

A. Well, for hard manual labor I should say it would quite materially impair it; just the extent I could not say, but—

Mr. ROBERTSON.—That is all.

Cross-examination.

(By Mr. FERRIS.)

Q. How long did that examination take you, Doctor? A. Probably half an hour.

Q. You examined him for the purpose of coming here to testify, I assume?

A. I examined him at the request of Mr. Robertson.

Q. You knew at the time you would be called to testify as a result of your examination?

A. I supposed I would.

Mr. FERRIS.—I think that is all.

Witness excused. [100—68]

[**Testimony of Catherine M. O'Connell, for Plaintiff.**]

CATHERINE M. O'CONNELL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Please state your name.

A. Mrs. O'Connell.

Q. Mrs. O'Connell, where do you live at this time?

A. 01604 Magnolia.

Q. I will ask you to state what your relation is to the boy here? A. He is my son.

Q. Please state to the jury before this accident whether the boy was or was not sober and industrious and free from bad habits.

A. He was sober and industrious and a good boy.

Q. And what was his physical capacity?

A. He was a very healthy boy.

Q. Did he have very much of an education?

A. No, sir; not very much.

Q. I will ask you to state whether or not he had ever worked with a cant-hook or peavy to your knowledge.

Mr. FERRIS.—That is objected to.

The COURT.—It is not very likely she would know [101—69] except by hearsay.

Mr. ROBERTSON.—I say, to her knowledge?

A. No, sir.

Q. I will ask you to state if you saw him after the

(Testimony of Catherine M. O'Connell.)

injury, after he was hurt. A. Yes, sir.

Q. How long afterwards?

A. He was hurt on Saturday morning and I saw him on Sunday morning.

Q. Now, just tell the jury the condition of the injuries that you saw there when you saw him.

A. I did not recognize him. His face was all cut up and swollen so bad and his leg was about three times—

Q. Talk loud.

A. About three times as large as the size of his other, and his face was all cut up and swollen so I did not recognize him.

Q. Have you attended to his leg since the time of this injury? A. Yes, sir.

Q. Tell the jury how it has affected him physically as you observed him.

A. It always has bothered him; it was very bad for five or six weeks after he came home from the hospital, and he always rubs it with liniment and keeps right on off and on and it always bothers him.

Q. What was his age at the time of this accident?
[102—70] A. Seventeen.

Q. Do you know whether or not since that time he has been able to do the same character of lifting as he was before?

Mr. FERRIS.—That is objected to on the ground—

Mr. ROBERTSON.—I withdraw the question.

Q. State to the jury whether or not before the accident or the injury you noticed whether or not

(Testimony of Catherine M. O'Connell.)

he was an active boy.

A. Yes, sir, a very active boy.

Q. Was your husband at home when he went to work there? A. No.

Q. I will ask you to state if at any time it is true that he was loading or unloading logs.

Mr. FERRIS.—That is objected to as immaterial.

The COURT.—I think so.

Mr. ROBERTSON.—That is all.

Cross-examination.

(By Mr. FERRIS.)

Q. You say he was seventeen. When was his birthday? A. On the 4th of March.

Q. This accident happened February 18th, 1910. Now, when was he seventeen?

A. He was seventeen the 4th of March. [103—71]

Q. Following the accident? A. No, before.

Q. You mean he would be eighteen on the 4th of March, 1910? A. Yes, sir.

Q. So that he was very near eighteen at the time of the accident? A. Yes, sir.

Mr. FERRIS.—That is all.

Witness excused.

Thereupon an adjournment was taken until 2 o'clock P. M. of this day, Friday, September 20, 1912, at which time the trial was resumed and the following proceedings were had: [104—72]

[Testimony of Freeman Harris, for Plaintiff.]

FREEMAN HARRIS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CAIN.)

Q. State your name. A. Freeman Harris.

Q. Where do you live?

A. Spokane, Washington.

Q. What was your occupation in February, of 1910?

A. I was car inspector for the W. I. & N.

Q. In what place were you employed?

A. At Potlatch and Palouse.

Q. How long were you engaged as car inspector for that company? A. Six years and a half.

Q. Did your duties take you frequently to Palouse?

A. Every day.

Q. You have heard the testimony of the witnesses about the place where this trainload of cars was being loaded? A. Yes, sir.

Q. How frequently were you at that place?

A. I was there two and three times a day. [105—73]

Q. And about the time that the witnesses have testified that this injury occurred?

A. At certain times I was.

Q. During the month of February, 1910, you were there frequently, were you?

A. I was there frequently until 12 o'clock at night.

Q. Do you know the system of lighting that local-

(Testimony of Freeman Harris.)

ity that the Potlatch Company employed?

A. Yes, sir, and the lights.

Q. What was the fact about that being well or poorly lighted?

Mr. FERRIS.—That is objected to as calling for a conclusion.

The COURT.—If he can state positively.

Mr. CAIN.—Q. How was it lighted?

A. The poles were about 140 feet apart about 30 feet from the first track.

Q. Were the lights always kept in repair?

Mr. FERRIS.—That is objected to on the ground it is not material and not competent.

The COURT.—I think I will sustain the objection unless it relates to this particular day.

Mr. CAIN.—Q. State what you know about the sufficiency of that light to enable a person to see while on those cars or passing along by them.

Mr. FERRIS.—I think that calls for a conclusion, [106—74] if the Court pleases.

The COURT.—No, I think not.

Mr. FERRIS.—Very well.

A. Why, a person walking along by them, there is light enough to see plentiful by them.

Mr. CAIN.—Q. Could what?

A. Light enough to see walking along by them or like that.

Q. Looking at the cars or looking to see logs on the cars? A. They could see logs.

Q. Did you find for your car inspection work that that light was sufficient? A. Oh, no—

(Testimony of Freeman Harris.)

Mr. FERRIS.—That is objected to on the ground it is immaterial.

The COURT.—I do not think it is a proper criterion. I presume a man would need a pretty good light to inspect a car.

Mr. CAIN.—Q. Did you ever observe a fog rising from the pond there?

A. Yes, sir, very frequently.

Q. What effect did that have upon the lights?

Mr. FERRIS.—That is objected to upon the ground that is a matter of common knowledge, the general effect the fog would have. [107—75]

The COURT.—It would obscure the light in a measure undoubtedly.

Mr. CAIN.—Q. Are you familiar with the method of unloading the logs? A. Yes, sir.

Q. Have you had experience in unloading logs?

A. I unloaded logs there myself.

Q. State whether or not that is a dangerous occupation for an inexperienced person.

Mr. FERRIS.—That is objected to as calling for the conclusion of the witness.

Mr. CAIN.—We have authority on that, your Honor.

Mr. FERRIS.—I do not think they have shown that this man is competent to pass on that.

Mr. CAIN.—How were they unloaded?

A. They used the swinging crane there. In the first place, the books was placed in these cables—

The COURT.—Is there any dispute over the method of unloading?

(Testimony of Freeman Harris.)

Mr. FERRIS.—Absolutely none. It is not an issue here.

A. When the cables are tightened up, then the chains are loosened.

Mr. CAIN.—Q. Have you had any experience in removing the logs from the cars that are not taken off [108—76] by the crane?

A. What was left on the cars lots of times.

Q. State whether or not, knowing how they are left upon the cars, that is a dangerous thing for an experienced person.

Mr. FERRIS.—That is objected to on the ground it is calling for the conclusion. It seems to me the witness might tell the general practice of taking those logs off, and the jury can draw their own conclusion from that state of facts; it is not complicated in any way.

The COURT.—It is only a question in my mind as to whether or not it is not a matter of common knowledge.

Mr. FERRIS.—It seems to me it is.

The COURT.—(After argument.) The question, in my mind, is this: it may be that an inexperienced youth would not understand the dangers there, but this jury is not composed of inexperienced youths. This witness has detailed the exact manner in which the accident happened, and it seems to me the jury can say whether that was hazardous or not, and whether the hazard would be known to a man of his experience, or if there is a peculiar hazard that a grown man of average intelligence would not appre-

(Testimony of Freeman Harris.)

ciate; that is the test in this question. I am very strongly inclined to think that it is an insult to the intelligence of this jury to say they [109—77] would not understand the danger incident to that work. However, I will permit the witness to state what these dangers are.

Mr. CAIN.—In view of the objection of counsel that the testimony is not competent and in view of your Honor's view of the matter, which is ours, I will not press that inquiry.

The COURT.—I agree with you as to the law entirely, but I disagree with you as to the question that it requires any particular expert knowledge to know the dangers.

Mr. CAIN.—Does it require any experience to understand the particular use of a cant-hook in moving logs upon a place such as you have heard described?

Mr. FERRIS.—That is objected to for the reason that there is no allegation that that had anything whatever to do with the accident.

The COURT.—I think I will permit an answer to the question.

Mr. FERRIS.—Very well.

A. Well, there is danger, yes, sir.

Mr. CAIN.—Q. What?

A. There is danger.

Q. Well, does it require experience to know how to use one properly?

A. It certainly does. [110—78]

Mr. CAIN.—That is all.

(Testimony of Freeman Harris.)

Mr. FERRIS.—No questions.

Witness excused.

Mr. ROBERTSON.—We rest.

Thereupon Mr. Ferris made an opening statement to the Court and jury on behalf of the defendant, and thereafter the following evidence was introduced in behalf of the defendant: [111—79]

[Testimony of Joe Loehr, for Defendant.]

JOE LOEHR, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FERRIS.)

Q. State your full name. A. Joe Loehr.

Q. By whom are you employed?

A. The Potlatch Lumber Company.

Q. And you were so employed during the month of February, 1910? A. Yes, sir.

Q. How long had you been employed by that company prior to that time?

A. About a year and a half.

Q. What position did you hold, if any, with that company at that time?

A. I was foreman at the pond at the time this man got hurt.

Q. The plaintiff in the action was employed under you at the time of the accident? A. Yes, sir.

Q. Will you explain to the jury the general situation there with reference to the location of the [112—80] pond and the track?

(Testimony of Joe Loehr.)

A. Well, it has been pretty well explained to-day, I see.

Q. The size of the pond, approximately?

A. Well, the pond held 30 to 31 cars, about. I would not just recollect which is right, that is, the dumping pond, and we had 13 arc-lights at about 30 feet, I guess, just so our machines would work; there was 13 arc-lights strung along there; the cars are 41 feet and a half long.

Q. The approximate length of the track was what?

A. Pretty near a quarter of a mile.

Q. About how far distant were these lights from each other?

A. Well, I should say about 100 feet or probably a little more or less, I would not say.

Q. Can you tell the jury approximately the size of those lights?

A. I could not say just the size, but they were big arc-lights, big globes in them, as big as you could pretty near reach around them. (Indicating).

Q. Do you know what candle-power?

A. I could not say exactly, but somewhere around 150 candle-power, I think.

Q. Commencing with the day the plaintiff first came there for employment, state what he first was [113—81] employed to do, if anything.

A. Well, I could not say. I never employed anybody. I did not hire anybody for a certain job.

Q. What did he say when he came to you, if anything, about employment?

A. I don't recollect what he did say, only he

(Testimony of Joe Loehr.)

probably asked for work; it is quite a while ago.

Mr. ROBERTSON.—We object to what he probably did, if he don't recollect.

The COURT.—I sustain the objection.

Mr. FERRIS.—Q. Just state what he was first directed to do when you gave him employment, what his first duties were.

A. I expect he was working on that boat, probably.

Q. What were his duties upon the boat?

A. Measuring logs or running the saw or pulling in logs.

Q. And the boat was located upon this pond that you speak of? A. Yes, sir.

Q. The work there was conducted in the nighttime as well as in the daytime? A. Yes, sir.

Q. In working upon this pond where would the light come from that was furnished for the pond?

A. Well, there was two arc-lights on this boat [114—82] a purpose for the saw business, and then there was some smaller lights around the saws.

Q. What other lights, if any, were around there other than these 13 that you have mentioned?

A. 13 in the one string; there was two on the boat, and there was one under the jack ladder where they put logs. There was 16 arc-lights altogether, and two little small lights that pointed on the saws.

Q. How many nights, if any, had the plaintiff worked in helping you unload logs prior to the accident?

A. I could not say how many nights he worked;

(Testimony of Joe Loehr.)

he might have been there three or four nights or two nights or probably he was only there a couple of nights, as far as I can remember.

Q. Who, if anyone, was working with him?

A. Roy Rudd was working with him.

Q. How long had Roy Rudd been employed there prior to this time?

A. Why, he had been working for me quite a while off and on.

Q. Well, approximately how long?

A. I guess pretty near a year.

Q. How long each evening would it take to unload the logs from the cars that were left there after the crane had unloaded?

A. After the crane left? [115—83]

Q. Yes.

A. Some nights it would not take any time at all, and other nights it might take five minutes or ten minutes; it depends on what was left on the cars.

Q. What is the fact as to whether or not the crane would or would not remove most all of the logs from the cars?

A. Well, sometimes there would be a short log or something that would slip through the cable before it got off, if it was icy or anything; the logs would not lay far enough ahead so it would be on one end of the cable, and it would slip off and the cable would come off and the log would fall back on the car.

Q. Now, on the night of the accident, do you recall seeing the particular car upon which the logs were located? A. I do not.

(Testimony of Joe Loehr.)

Q. Plaintiff testified that you directed him to get on this car and throw off the particular logs that they were handling at the time; what is the fact with reference to that?

A. If I did, I do not recollect anything about it.

Q. Where were you at the time of the accident?

A. I was at what they call the pump-house where we eat our lunch nights. I was in there when Rudd came and [116—84] told me the man was hurt.

Q. When who told you? A. Rudd.

Q. How long had you been in the pump-house?

A. Sir?

Q. How long had you been in the pump-house and away from the work?

A. Oh, I might have been in there an hour, generally for an hour at night, or half an hour, something like that. We generally had half an hour for lunch, but then I might have been in there a good deal longer than that.

Q. How long prior to the lunch hour was it that you last saw the plaintiff?

A. I could not say. I might have not seen him after 7 o'clock, after I went to work there, and I might have seen him probably fifteen or twenty minutes before he got hurt, as far as I can remember.

Q. Now, on the night of the accident, and the night previous what were his duties there, what was he employed to do?

A. Why, he was not employed for no certain job. We did not have anybody there for a certain job—

(Testimony of Joe Loehr.)

take whatever would come along.

Mr. ROBERTSON.—I move to strike that part about did not have anybody for a certain job; the reference [117—85] is to the plaintiff only.

The COURT.—Yes, he said he was employed generally to do whatever came along.

Mr. FERRIS.—Q. Who directed the plaintiff with reference to what work he would perform?

A. I would tell him if I had anything for him to do, I would tell him what to do.

Q. What character of work did the man Rudd do?

A. He done all work around there, too, only when the cars come in he would help unload them and then he would do whatever there was to do around there.

Q. Were he and the plaintiff employed to do the same kind of work?

Mr. ROBERTSON.—To that I object on the ground it is not competent.

The COURT.—I doubt if it is material.

Mr. FERRIS.—Q. What was the man Rudd doing on the night of the accident?

A. Why, he was unloading logs.

Q. What is the fact as to whether or not on the night of the accident it was a clear night or otherwise, if you remember?

A. I could not remember whether it was a clear night or not.

Q. What is the fact as to whether or not the men engaged upon the cars could see the logs with the lighting [118—86] system you had there?

Mr. ROBERTSON.—To that I object on the

(Testimony of Joe Loehr.)

ground that the witness testified he could not remember the condition of the night; he has not shown any knowledge of it that would warrant him in testifying; it is a conclusion of the witness, not based upon any facts sufficient to draw a conclusion.

The COURT.—If he knew the conditions that existed there generally over a long period of time, I think he might testify to it.

Mr. FERRIS.—He testified he had been there a year and a half.

The COURT.—You may answer the question.

A. Why, we always unloaded the logs no matter whether it was a good moonlight night or a dark night, it was just the same, whoever was there unloaded them if the crane did not throw them all off, they got up there with the peavies and throwed them off.

Mr. FERRIS.—Q. Now, particularly calling your attention to this night, in throwing off these three logs what was necessary to be done by the plaintiff?

A. Why, not very much, only to get up there with a peavy or a cant-hook and roll them off.

Q. Do you remember seeing these logs at all on the night of the accident?

A. I do not, sir. [119—87]

Mr. FERRIS.—I think you may take the witness.

Cross-examination.

(By Mr. ROBERTSON.)

Q. You had a man doing the work in the pump-house, did you? A. Sir?

Q. You had one particular man to stay in the

(Testimony of Joe Loehr.)

pump-house and do the work there, didn't you?

A. I had nothing to do with the pump-house.

Q. I thought you said you were there half an hour before supper or more, maybe an hour?

A. I say, I might have been in there.

Q. What were you doing?

A. I was in there when Rudd came in.

Q. What were you doing?

A. Sitting down or eating my supper, probably.

Q. You said you were there an hour before supper; what were you doing there before supper?

A. Probably sitting down with the man running the pump?

Q. Sir?

A. Probably sitting down with the man running the pump, talking to the man running the pump. I sat in there for hours at a time?

Q. At night? [120—88] A. Yes, sir.

Q. The colder the night the longer you would sit, wouldn't you? A. You bet you.

Mr. FERRIS.—I object to that on the ground that is not material.

Mr. ROBERTSON.—This particular night was extra cold, wasn't it?

A. I could not remember whether it was very cold or not.

Q. Do you remember the circumstances of the boy telling you of his feet becoming wet?

A. I don't remember it.

Q. On any night—that night or the night before?

A. I cannot remember of his ever telling me so.

(Testimony of Joe Loehr.)

Q. Well, will you say he did not tell you, or you did not excuse him to go home the night before?

A. He never asked me, not that I can recollect.

Q. You say you hired men, did you?

A. I hired men.

Q. And you fired them? A. And I fired them.

Q. And you watched them? A. Yes, sir.

Q. And you superintended them? A. Yes, sir.

[121—89]

Q. And if they did not suit you in doing work in one way you would tell them to do it another?

A. Yes, sir.

Q. And you bossed the loading and unloading of the logs? A. Yes, sir.

Q. It was your job to do that, whether you did or not? A. Yes, sir.

Q. You were to see that those logs got off, weren't you? A. Certainly.

Q. Now, you say sometimes when a log was full of ice it slipped out of the cable? A. Yes, sir.

Q. That time of the year lots of the logs would be covered with a sheet of ice, would they not?

A. Yes, sir.

Q. And that made them handle differently than if they had not been covered with ice when you used a peavy on them or a cant-hook? A. Yes, sir.

Q. In other words, they would hold in a log when the bark was not frozen, or when the body and bark was frozen the pick would not catch it, I mean, the pick of the cant-hook would not catch it, the tooth of the hook, rather? [122—90]

(Testimony of Joe Loehr.)

A. No, it would not catch the wood; no.

Q. So that there was a different degree of danger in moving or not moving those logs that you knew on that night, if they were covered with ice or if they were not?

Mr. FERRIS.—I object on the ground that there is no testimony that those logs were covered with ice that the plaintiff was handling.

The COURT.—I think probably that is a matter of common knowledge, also, that logs would slip easier when covered with ice.

Mr. ROBERTSON.—Q. So that in order to work safely on top of the trucks there and knowing just how those logs were going to be moved, it was really necessary to have light enough to see the logs and see the condition of the cars down there (indicating) as to whether or not they were frozen and slippery? A. Yes, sir, you could see that.

Q. And that was necessary for a man to know so he could tell how safe he was or how unsafe he was in moving those logs or not, according to your judgment as foreman? A. I do not understand.

Q. Read the question. (Question read.)

A. Why, a man ought to know how to get up there and do his work, yes.

Q. And of course he had to do it one way when it was [123—91] covered with ice and another way when it was not? A. Oh, no, it is the same thing.

Q. Now, did you notice sometimes the logs came over filled with snow? A. Certainly, lots of them.

(Testimony of Joe Loehr.)

Q. Was this a logging road that these logs would be loaded from?

A. They were loaded out of the woods onto the cars.

Q. Yes, and the snow from the trees as well as the snow falling generally would fall upon those trucks, is that right?

A. There would not much from the trees fall on it.

Q. And sometimes those trucks would wait out there at the siding for as much as a week or ten days waiting for logs to come.

A. I could not say how long they would have to wait.

Q. And frequently the man in loading the logs would have to shove the snow off?

A. He certainly would sometimes if there would come too much on them.

Q. It was necessary, as I understand, to have a light there to do that work? A. Oh, yes.

Q. A proper light? A. They had a light.

Q. Now, you do not know from your recollection whether [124—92] that fog from that pond that night was blowing over the tracks where the logs were or not? A. I do not.

Q. Or whether or not any lights shone at the point where those logs were by reason of a fog or other conditions there?

A. I could not say whether there was a fog there or not.

Q. You testified, I believe, that there was a row of logs or row of lights—I want to draw the track

(Testimony of Joe Loehr.)

nearest to the pond—would that be a straight railroad track?

A. A straight track, just as straight as you could draw it.

Q. I will draw it like that (illustrating).

A. Yes, sir.

Q. Now, beyond the pond would there be another straight track? A. Another track back.

Q. How far back, would you say?

A. It is 16 feet from track center to track center, if I recollect right.

Q. There would be another track over here?

A. Yes, sir.

Q. And the pond would be, say, on this side?

A. Yes, sir.

Q. These arc-lights, you say, were how far off of [125—93] this track? A. Not over 30 feet.

Q. All right, 30 feet; then you say they were 100 feet apart? A. Something like that.

Q. Wasn't it about 150 feet?

A. No; there was 13 arc-lights in the 30 cars' length, and the cars were 41 feet and a half long.

Q. All right, along like that. You do not know whether or not that light or that light or that light was out?

A. I don't know whether there was any of them out, no.

Q. Or whether any of them was burning, according to your recollection?

A. They was burning when I went to work at 7 o'clock, because it was my business to have to turn on the lights.

(Testimony of Joe Loehr.)

Q. How was this pond heated? Tell the jury.

A. Hot water.

Q. Did the hot water discharge from the ordinary operations of the mill into the pond, or did they have a special heating arrangement?

A. From the boilers.

Q. Just the exhaust from the boilers?

A. From the engines.

Q. In February there it is usually below the [126—94] freezing point at night along between 12 and 1 o'clock, probably below zero?

A. Generally about that time; yes, sir.

Q. The heat is enough to keep how much open water there? A. It keeps that whole pond open.

Q. Have you ever passed Hot Lake, Oregon, in the winter? A. No, sir.

Q. Or any hot lake? A. No, sir.

Q. Would you tell the jury whether or not this stuff that arose from this pond was constant—this fog at any time constantly rose or just rose at times?

A. It did not raise all the time, hardly ever.

Q. But when it did raise it covered and obscured everything in its immediate vicinity?

A. Well, to a certain extent it did.

Q. And of course when it rose at all it would extend along here (indicating), wouldn't it?

A. It would rise on the pond.

Q. Yes, this track was right in the pond, wasn't it, right on the edge of the pond?

A. Right on the edge of it.

Q. You could jump it right off from the car into

(Testimony of Joe Loehr.)

the pond? A. Yes, sir. [127—95]

Q. So when there was any steam from that pond it covered the track, did it not?

A. It depends on how the wind was blowing.

Q. You knew that there was some logs that were not off of that train that night?

A. I knew it after Rudd came in and told me.

Q. Wasn't it your business to superintend the unloading of that train of loaded cars?

A. Yes, sir, but I did not have to stand out there all the time and watch them do it.

Q. You do not go in the pump-house and let business go alone, do you, often?

A. I happened to at that time.

Q. You knew that it was a dangerous work on top of those cars, but felt that if a man of experience and knowledge used care he could avoid it?

A. Why, there is danger in all work.

Q. Answer that question, please.

Mr. FERRIS.—I think he did answer it.

The WITNESS.—There is danger in all kinds of work.

Mr. ROBERTSON.—Q. I know, but you knew it was more dangerous in winter than it was in summer?

A. Certainly, any logs standing there with snow and ice, it is more dangerous standing up there in winter time than it was in summer time.

Q. And you knew also that if the logs were moved [128—96] and the thaw come that it would be apt to arise in the boat, didn't you?

(Testimony of Joe Loehr.)

Mr. FERRIS.—There is no evidence of any such state of facts here; I object to it.

Mr. ROBERTSON.—Q. When logs stood near this pond here, was there heat enough to thaw to some extent the snow on the trucks?

A. There was not.

Q. It would affect it some, wouldn't it?

A. Not a bit that I could ever see.

Q. You knew that a boy did not have as much judgment in handling logs as a man, did you not?

The COURT.—That is a matter of common knowledge.

Mr. ROBERTSON.—Q. Did you discuss with this boy at any time what his duties were in handling logs? A. I don't recollect if I did or not.

Mr. FERRIS.—If the Court pleases, that is the same objection we made this morning with reference to the warning, and it will go in under the same objection.

The COURT.—Yes, sir.

Mr. ROBERTSON.—Q. Why didn't you instruct him as to his duties?

A. Why, I probably did not think of it at the time, or something like that. I don't know just why I did not tell him. Probably I did tell him; I don't recollect. He said this morning that I showed him how to put the cable on the car. I don't recollect whether I did or not; [129—97] probably I did. I have put men to work there and showed them how.

Q. Told them how to get the logs off and how to

(Testimony of Joe Loehr.)

watch that they did not get hit when they were rolling off?

A. Well, I told some of them; I don't recollect whether I told him or not.

Q. You would tell a green man?

A. Sometimes when I would put a new man there and think of it I would tell him.

Q. You would tell him when you thought it was necessary?

A. I would tell him when I thought it was necessary if I would think about it; if I did not think about it, though, I would not.

Q. If he was inexperienced you would judge it to be necessary, and if he was experienced, you would think he had that knowledge?

Mr. FERRIS.—I object to that.

The COURT.—I sustain the objection. The jury is only interested in this particular case.

Mr. ROBERTSON.—That is all.

Redirect Examination.

(By Mr. FERRIS.)

Q. Do you recall at any time that this fog or mist [130—98] that Mr. Robertson speaks of rose from that pond so you could not see your logs if you were on the car? A. No, I don't.

Q. You could always see them, anyhow?

Mr. ROBERTSON.—I object as leading and suggestive.

Mr. FERRIS.—That is all.

Mr. ROBERTSON.—Q. The other boy that was working there was a youth, too, was he not?

The COURT.—He said he was twenty years old.

Mr. ROBERTSON.—Did he say that, if your Honor pleases?

The COURT.—Somebody did, at least; I think it was this witness.

Mr. ROBERTSON.—That is all.

Witness excused.

Mr. FERRIS.—We rest.

Mr. ROBERTSON.—We rest.

[Motion for Verdict in Favor of Defendant.]

Mr. FERRIS.—I desire to make a motion at this time. I desire to move the Court to direct a verdict in favor of the defendant for the reason that the testimony shows not only that the defendant was not guilty of any negligence in the premises, but that any risk that was there was open and obvious, and that the plaintiff assumed any risk in connection with doing the work there; on the further ground, that the injury to the [131—99] plaintiff, if brought about by the negligence of anyone other than himself, was the negligence of his fellow-servant Rudd, and the further ground that his own negligence in attempting to remove the logs at a time when he stated he did not exactly understand the conditions under which it was located upon the car charges him with contributory negligence as a matter of law.

The COURT.—(After argument.) I will submit the question to the jury for the present, but the jury are to draw no inference one way or the other from the rulings of the court. The questions of fact

are exclusively for them to determine.

To which ruling the defendant excepted and an exception was allowed.

Mr. FERRIS.—There is one matter that your Honor has not ruled on, as I understand it, and that is some testimony about this warning.

The COURT.—You preserved your exception. Counsel seems willing to rest on his complaint, and I will determine that question later.

Mr. FERRIS.—Very well, with that understanding.

The COURT.—As a matter of precaution, if I was acting for the plaintiff I would amend my complaint, but if you want to stand on it, you can.

Mr. CAIN.—I think that was Mr. Robertson's intention, but I understand the Court can treat the complaint as amended. [132—100]

The COURT.—No, the case will have to stand on the complaint as it exists. The testimony went in under objection. I do not want you to go into the case with any misunderstanding. I expressly stated at the time that I would admit the testimony under the objection, and if you made application to amend, I would determine then whether the amendment should be allowed and what condition it should be allowed under and not otherwise.

Mr. CAIN.—I do not know whether Mr. Robertson is laboring under a misapprehension about it or not. I would like to see him a moment.

The COURT.—Counsel on the other side, you will remember, stated what he expected to prove by this absent witness.

Thereupon counsel for the respective parties argued the case to the jury.

Whereupon the Court instructed the jury. Whereupon the jury retired, and after an absence returned into court with a verdict in favor of plaintiff for damages in the sum of \$3,500.00, and against the defendant, upon the 20th day of September, 1912.

Thereafter, and within the time allowed by law, the defendant moved the Court for judgment *non obstante veredicto*, and in the event said motion was denied defendant moved the Court to set aside the verdict and grant a new trial. Said motions came on regularly for hearing, both parties being present, and were argued by counsel for the respective parties, and by the Court overruled, to which ruling and each of them the defendant by its attorneys then and there excepted, and the exception was allowed. [133—101]

Whereupon, and thereafter, and on the 9th day of April, 1913, judgment was rendered and entered upon said verdict in favor of plaintiff and against defendant, for \$3,500.00, the total amount of said judgment being said sum of \$3,500 and —— dollars, costs and disbursements; and now, in furtherance of justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this cause, and prays the same may be settled and allowed, and signed and certified by the Judge as provided by law and the practice of this Honorable Court.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. [134]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1319.

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem.

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

**Certificate and Order Allowing and Settling Bill of
Exceptions.**

This cause came on duly and regularly for hearing before the court on the 14th day of June, 1913, upon application of the defendant for the settling and certifying of its proposed bill of exceptions lately filed herein, the time for presenting, filing and serving said proposed bill of exceptions having been heretofore extended by order of this Court, and the said proposed bill of exceptions having been presented, served and filed within the time allowed by said orders, and the plaintiff having proposed no amendments to said bill of exceptions, and the time for serving or filing any proposed amendments to said bill of exceptions having expired.

Now, therefore, on motion of attorneys for defendant it is ORDERED, that said proposed bill of exceptions heretofore filed by the defendant in this cause, is hereby approved, allowed and settled as the true, full and correct bill of exceptions in said cause, containing in full all the evidence and pro-

ceedings taken and had upon the trial of said cause, and that the same as so settled and allowed be now and here certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, and [135] that the bill of exceptions when so certified be filed herein by the clerk.

The foregoing bill of exceptions is full, true and correct in all respects, and it is hereby approved, allowed and settled, and made a part of the record herein.

Done in open court this 14th day of June, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bill of Exceptions. Received by the Clerk of said Court on May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

Filed, after being allowed and settled by the Court, in the U. S. District Court for the Eastern District of Washington, June 14th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [136]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Assignments of Error.

Comes now the Potlatch Lumber Company, defendant in the above-entitled action, and makes and files the following assignments of error in said cause, which said defendant and plaintiff in error will rely upon in the United States Circuit Court of Appeals for the Ninth Circuit for relief from and a reversal of the judgment rendered in said cause in the above-entitled court, to wit:

1. The Court erred in permitting the plaintiff J. J. O'Connell to testify over defendant's objection that he had not been warned or instructed by defendant with reference to the dangers incident to unloading the logs from the cars (Bill of Exceptions, pp. 23 to 29), to the offer of which testimony defendant objected for the reason that failure to warn or instruct was not one of the grounds of negligence set forth and relief upon in plaintiff's complaint.

2. The Court erred in permitting the witness Joe Loehr to testify over defendant's objection with [137] reference to the warning or instructions which plaintiff had been given in respect to the danger incident to unloading logs from the cars (Bill of Exceptions, pp. 97, 98), to the offer of which testimony defendant objected, for the reason that failure to warn or instruct was not one of the grounds of negligence alleged and relied upon in plaintiff's complaint.

3. The Court erred in refusing to grant defendant's motion to direct a verdict for the defendant, made at the close of all the testimony in the case,

which motion was based upon the ground that the plaintiff had failed to prove that defendant was guilty of any negligence in the premises; that the risks incident to doing the work were open and obvious, and that plaintiff therefore assumed the same. That the injury to plaintiff, if brought about by the negligence of anyone other than himself, was brought about and caused by the negligence of his fellow-servant, Roy Rudd; and for the further reason that plaintiff was guilty of contributory negligence as a matter of law, in attempting to remove the log from the car without first ascertaining in what position it was lying with reference to other logs upon the car; to which ruling defendant excepted, and the exception was allowed.

4. The Court erred in denying defendant's motion for judgment *non obstante veredicto*, for the reasons and upon the grounds and each and all of them, stated in assignment of error No. 3, to which ruling defendant excepted and the exception was allowed.

5. The Court erred in entering judgment upon verdict of the jury in favor of plaintiff, for the reason and upon the grounds and each and all of them, stated in [138] assignment of error No. 3, to which entry of judgment the defendant excepted and the exception was allowed.

The defendant duly excepted to the rulings of the Court in the matter of each of the above errors assigned, and hereby and now assigns each and every

one of said rulings as error.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Due service of within Assignments of Error by receipt of a true copy thereof admitted this 28th day of May, 1913.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Assignments of Error. Filed in the U. S. District Court for the Eastern District of Washington. May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [139]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by CATHERINE M. O'CONNELL, His Guardian ad Litem.
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit.

Comes now the above-named defendant, Potlatch Lumber Company, a corporation, by its attorneys, and complains that in the records and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said United

States District Court for the Eastern District of Washington, Northern Division, at the April term thereof, 1913, manifest error hath happened to the great damage of this defendant.

Your petitioner further respectfully shows that it has this day filed herewith its Assignments of Error committed by the Court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, its suit in error.

WHEREFORE, the defendant prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond for a supersedeas in said case; and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 28th day of May, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. [140]

[Endorsements]: Due service of within Petition by receipt of a true copy thereof admitted this 28th day of May, 1913.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Petition for Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [141]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

J. J. O'CONNELL, a Minor, by CATHERINE
M. O'CONNELL, His Guardian ad Litem.
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

**Order Allowing Writ of Error [and Fixing Amount
of Bond].**

The defendant, Potlatch Lumber Company, a corporation, having this day filed its petition for a Writ of Error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of said security all further proceedings of said court be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit; and said petition having this day been duly allowed:

Now, therefore, it is ORDERED that upon the said defendant, Potlatch Lumber Company, filing with the Clerk of this Court a good and sufficient

bond in the sum of Five Thousand Dollars, payable to J. J. O'Connell, a minor, by Catherine M. O'Connell, his guardian ad litem, plaintiff in the above-entitled cause to the effect that if said defendant, Potlatch Lumber Company, and plaintiff in error shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and effect, the said bond to be approved by the Court; that all further proceedings in this suit be, and they [142] are hereby suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

Dated this 28 day of May, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Due Service of within Order by receipt of a true copy admitted this 28th day of May, 1913.

(Signed) ROBERTSON & MILLER,
Attorneys for Plaintiff.

Order Allowing Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [143]

Original.

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

J. J. O'CONNELL, a Minor, by CATHERINE
M. O'CONNELL, His Guardian ad Litem.

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Writ of Error.

The President of the United States, to the Honorable
Judges of the District Court of the United
States, for the Eastern District of Washington,
Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, or some of you,
between the Potlatch Lumber Company, a corpora-
tion, plaintiff in error, and J. J. O'Connell, a minor,
by Catherine M. O'Connell, his guardian ad litem,
defendant in error, a manifest error hath happened
to the great damage of the said Potlatch Lumber
Company, plaintiff in error, as by its complaint
appears:

We being willing that error, *that error*, if any
hath *been*, a full and speedy justice be done to the
parties aforesaid in this behalf, do command you, if
judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 27th day of June, next, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid be inspected, the said Circuit Court of [144] Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 28th day of May, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] W. H. HARE,
Clerk of the United States District Court for the
Eastern District of Washington, Northern Division.

By Frank C. Nash,
Deputy Clerk, U. S. District Court, Eastern District
of Washington. [145]

[Endorsed]: No. ——. In the U. S. District Court, Eastern District of Washington, Northern Division. J. J. O'Connell, a Minor, by Catherine M. O'Connell, His Guardian ad Litem, Plaintiff, vs. Potlatch Lumber Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington. Filed May 28, 1913. Wm. H. Hare, Clerk. By Frank C. Nash, Deputy Clerk.

Due service of within writ by receipt of a true copy thereof admitted this 28th day of May, 1913.

ROBERTSON & MILLER,
Attorneys for Plaintiff. [146]

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem.

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the Potlatch Lumber Company, a corporation, as principal, and the Fidelity & Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland and authorized to do business as a surety company in the State of Washington, are held and firmly bound unto J. J. O'Connell, a minor, by Catherine M. O'Connell, his guardian ad litem, and each of them in the full and just sum of Five Thousand (\$5,000) Dollars, to be paid to the said J. J. O'Connell, by Catherine M. O'Connell, his guardian ad litem, their heirs, executors, administrators, legal representatives or assigns, to which payment well and truly to be made we bind ourselves and our and each of our successors, heirs, executors, admin-

istrators and legal representatives jointly and severally firmly by these presents.

SEALED with our seals and dated this 28th day of May, 1913.

WHEREAS, lately, in the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said Court between J. J. O'Connell, a minor, by Catherine M. O'Connell, his guardian ad litem, as plaintiffs, and the said Potlatch Lumber Company, a corporation, as defendant, [147] a judgment was rendered in favor of said plaintiffs and against said defendant for the sum of Three Thousand Five Hundred Dollars (\$3,500), and costs of action, and the said Potlatch Lumber Company has obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a Citation directed to the said above-named plaintiffs citing and admonishing them to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said Potlatch Lumber Company, plaintiff in error, shall prosecute its said Writ of Error to effect, and answer all damages and costs if it fails to make good its plea, then this obligation

shall be void; otherwise to remain in full force and effect.

(Signed) POTLATCH LUMBER COMPANY,

By CANNON, FERRIS & SWAN,

Its Attorneys.

(Signed) FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By W. S. McCREA,

Attorney in Fact.

(Signed) Attest: W. L. BERRY,

General Agent.

[Seal of Corporation Surety Co.]

The above and foregoing bond approved this 28 day of May, 1913.

(Signed) FRANK H. RUDKIN,

Judge. [148]

[Endorsements]: Due service of the within bond by receipt of a true copy thereof admitted this 28th day of May, 1913.

(Signed) ROBERTSON & MILLER,

Attorneys for Plaintiff.

Bond on Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, May 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [149]

Original.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Citation [on Writ of Error].

United States of America,—ss.

The President of the United States to J. J. O'Connell, a Minor, by Catherine M. O'Connell, His Guardian ad Litem, and to Robertson & Miller, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein the Potlatch Lumber Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of May, A. D. one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal]

FRANK H. RUDKIN,
United States District Judge. [150]

[Endorsed:] No. ——. In the U. S. District Court, Eastern District of Washington, Northern Division. J. J. O'Connell, a Minor, by Catherine M. O'Connell, His Guardian ad Litem, Plaintiff, vs. Potlatch Lumber Company, a Corporation, Defendant. Citation. Filed in the U. S. District Court, Eastern Dist. of Washington. Filed May 28, 1913. Wm. H. Hare, Clerk. By Frank C. Nash, Deputy Clerk.

Due service of within citation by receipt of a true copy thereof admitted this 28th day of May, 1913.

ROBERTSON & MILLER,
Attorneys for Plaintiff. [151]

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

J. J. O'CONNELL, a Minor, by CATHERINE M.
O'CONNELL, His Guardian ad Litem,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said court, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Complaint;

Answer;

Reply;

Verdict;

Judgment;

Motion for judgment *non obstante veredicto*;

Petition for new trial;

Opinion;

Bill of exceptions; [152—1]

Order of September 23, 1912, extending time for preparing and filing bill of exceptions;

Order of October 31, 1912, extending time for preparing and filing bill of exceptions;

Order of December 30, 1912, extending time for preparing and filing bill of exceptions;

Order of April 5, 1913, extending time for preparing and filing bill of exceptions;

Order of April 10, 1913, staying execution;

Order of May 8, 1913, extending time for preparing and filing bill of exceptions;

Petition for writ of error;

Assignments of error;

Order allowing writ of error;

Bond on writ of error;

Citation;

Writ of error;

and any and all other records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Due service of within Praecept by receipt of a true copy thereof admitted this —— day of ———, 1913.

(Signed) FRED MILLER,
Of Atty. for Plaintiff.

Praecept for Transcript of Record. Filed in the U. S. District Court for the Eastern Dist. of Wash. Jun. 6, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy [153]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. J. O'CONNELL, a Minor, by His Guardian ad Litem, CATHERINE M. O'CONNELL,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Eastern District of Washington,
State of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, do hereby certify that the foregoing pages numbered from No. 1 to No. 153, inclusive, constitute and are a true complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 28th day of May, 1913. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$88.60, and that the same has been paid in full by the defendant and plaintiff in error, Potlatch Lumber Company. [154]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane in said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 18th day of June, 1913, and the Independence of the United States of America, the One Hundred and Thirty-eighth.

[Seal]

W. H. HARE,
Clerk of the United States District Court for the
Eastern District of Washington. [155]

[Endorsed]: No. 2281. United States Circuit Court of Appeals for the Ninth Circuit. Potlatch Lumber Company, a Corporation, Plaintiff in Error, vs. J. J. O'Connell, a Minor, by Catherine M. O'Connell, His Guardian at Litem, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed June 23, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

POTLATCH LUMBER COMPANY, a
Corporation,

Plaintiff in Error.

vs.

J. J. O'CONNELL, a Minor, by
CATHERINE M. O'CONNELL, his
Guardian *ad Litem*,

Defendant in Error.

No. 2281.

BRIEF OF PLAINTIFF IN ERROR.

*Upon Writ of Error to the United States District Court
of the Eastern District of Washington,
Northern Division.*

EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,

Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

This action was instituted by defendant in error to recover damages for personal injuries received while in the employ of plaintiff in error. The trial resulted in a verdict and judgment in favor of defendant in error for Thirty-five Hundred Dollars (\$3500) and costs. There is little or no dispute about the facts surrounding this accident. The record discloses that at the time of the accident the defendant in error lacked less than one month of being eighteen years of age (88), and that prior to the accident he had always been a bright, active boy in the possession of all his faculties. That he commenced to work at the age of fourteen and worked at different kinds of labor from that time on, such as working on the section, helping to make ties, clerking in a store, working on a ranch and helping to put up ice (37). He had been employed by plaintiff in error in and about its lumber mill located at Potlatch, Idaho, for about one month prior to the accident (35), and had worked in different capacities. On the night of the accident and for several nights prior thereto (64), he had been engaged with a fellow-servant by the name of Roy Rudd in removing from flat cars any logs which remained upon the cars after the crane had been used to unload the logs from the car. It appears that in unloading the logs from the cars a cable was placed around all of the logs on

the car and the crane was then used to lift this cable, and the logs from the car and that sometimes three or four logs would slip out of this cable as the crane was lifting the logs from the car and these three or four logs would remain upon the flat car in an irregular and disorderly condition (42-72-73).

It was a dark, cold misty night when the accident happened and there was some snow and ice upon the car where the defendant in error was working (43). He testified that the lights were some 150 to 200 feet away and that he could not see very well (43). At the time of the accident defendant in error and his fellow-servant, Roy Rudd, were engaged in removing from one of the flat cars three logs, some sixteen or eighteen feet in length (68-69), which were left upon it after the great body of logs had been removed by means of the crane. These three logs were scattered upon the car in an irregular and disorderly way. The end of one of these logs extended out beyond the body of the car. The defendant in error and Roy Rudd threw one of the logs off of the car in such a way that it struck this unsupported end of the log, which was extending beyond the car, with the result that the other end swung around and struck the defendant in error, throwing him from the car and causing the injuries complained of (44-45).

With reference to how the accident occurred the defendant in error testified as follows (44-45):

“Q. Now, then, tell the jury how you came to move the logs in question?

A. We had passed by there—the foreman came back with us to the side of the car and told us to get up on the car and roll them logs off. We got up there and I stepped on the inside, the other man at the end of the log, and we were trying to get them off.

Q. Sir?

A. We began to get them off. There was small logs on the car pretty near leven with the bunks, it was awful slippery and it took us some time to get the first log started, and when it started we started to move back, and when I started to move the other log hit me across the back, knocking me on my head in the pond.

Q. How did the log that struck you, how did that happen to be moved?

A. By the end of the other log.”

On cross examination the defendant in error testified as follows (73-74-75):

“Q. You were fully aware of the fact, weren't you, Mr. O'Connell, that if that log in rolling off hit the end of another that it might possibly fly around and hit somebody?

A. No, sir, I was not aware of the fact.

Q. You did not know that then?

A. No, sir, I did not.

Q. You did not know that if one body such as a log, would strike another on the end that possibly it might fly up and hit you; you did not know that?

A. No, sir, I did not.

Q. What did you think would happen if this log in falling off struck the end of another log?

A. I did not think it could fall off; that is (85-53), I thought it would roll straight off, would have been my opinion of it.

Q. You thought it would roll straight off? You did not go to the end of these logs to examine which were on top or which were underneath, did you?

A. No, sir.

Q. You could see that from where you stood right here, didn't you?

A. I was not far from the end of the logs.

Q. You were not over six or eight feet, were you?

A. Not much more.

Q. And you could see, whether this was on top or underneath, couldn't you, from where you stood?

A. That is why I could not give you a definite answer a minute ago on the length of that log, for I could not see the end of it.

Q. You mean to say from where you stood there you could not see six or eight feet?

A. You could see black, that is all, the log.

Q. You could see the black log?

A. Yes, sir, you could not see the end of it out where it stuck over the car.

Q. You could not see that it had snow underneath?

A. In some places.

Q. But you could not see from where you were standing to the end of this log six or eight feet way?

A. You could see the log. (86-54.)

Q. Could you see whether this log was on top or underneath?

A. I would not say whether it was on top, but I don't think it was underneath.

Q. As a matter of fact, you did not pay much attention, did you?

A. No, sir.

Q. You just went ahead and started to roll it off?

A. Yes, sir.

Q. And that is the way you had done with any other log that you had rolled off while you had been there?

A. Yes, sir."

Over the objections of plaintiff in error the trial court permitted defendant in error to introduce evidence to the effect that he had not been warned or instructed with reference to the dangers incident to unloading logs from the cars and that he was inexperienced in such work (48-54).

SPECIFICATIONS OF ERROR.

I.

The Court erred in permitting the defendant in error to testify over the objection of plaintiff in error that he had not been warned or instructed with reference to the dangers incident to unloading the logs from the cars (48-54), to the offer of which testimony plaintiff in error objected for the reason that failure to warn or instruct was not one of the grounds of negligence set forth and relief upon in defendant in error's complaint.

II.

The Court erred in permitting the witness Joe Loehr to testify over the objection of plaintiff in error with (137) reference to the warning or instructions which defendant in error had been given in respect to the danger incident to unloading logs from the cars (108-109), to the offer of which testimony plaintiff in error objected, for the reason that failure to warn or instruct

was not one of the grounds of negligence alleged and relied upon in defendant in error's complaint.

III.

The Court erred in refusing to grant plaintiff in error's motion to direct a verdict in its favor, made at the close of all the testimony in the case, which motion was based upon the ground that the plaintiff had failed to prove that defendant was guilty of any negligence in the premises; that the risks incident to doing the work were open and obvious, and that plaintiff therefore assumed the same. That the injury to plaintiff, if brought about by the negligence of anyone other than himself, was brought about and caused by the negligence of his fellow-servant, Roy Rudd; and for the further reason that plaintiff was guilty of contributory negligence as a matter of law, in attempting to remove the log from the car without first ascertaining in what position it was lying with reference to other logs upon the car; to which ruling defendant excepted, and the exception was allowed (110-111).

IV.

The Court erred in entering judgment upon verdict of the jury in favor of defendant in error, for the reason and upon the grounds and each and all of them, stated in (138) specification of error No. 3, to which entry of

judgment the defendant excepted and the exception was allowed (11).

ARGUMENT AND AUTHORITIES.

(SPECIFICATION OF ERRORS 3 AND ^{4.}~~5.~~)

The work in which defendant in error was engaged at the time of the accident was indeed of a most simple and ordinary character. To remove three logs from an ordinary flat car with the help of another man is an operation that any person of ordinary intelligence must fully understand. That the person of the age of approximately eighteen years who had been engaged in various kinds of common labor since his fourteenth year, as testified to by the defendant in error, should not know and fully appreciate the fact that if he rolled one log off the car in such a way as to strike the unsupported end of another log, that the latter log would undoubtedly swing around in some direction and probably hit him is beyond comprehension, and yet this is the position of defendant in error. He had unloaded many other cars during the several days that he worked prior to the accident. These several logs which would remain upon the car after the crane had unloaded the great body of logs from the car must necessarily be scattered upon the car in an irregular and disorderly manner, because they consisted of the few logs which slipped out

of the cable when the crane was being used. Wherein, we ask, was the master negligent? Was it because the defendant in error was not told that if he rolled one log off the car upon another unsupported log that he might be injured? A fact, which from his age, intelligence and experience he knew and appreciated as fully as did the plaintiff in error. Every child learns this principle before he is ten years of age. It is the principle which causes the small stick or peg to fly out of the hole when struck on the unsupported end by the stick in the hands of the player when engaged in playing the old familiar game of "peg and the stick," sometimes called "peg in the hole," a game which every child plays more or less as he is growing up. It is the knowledge of this principle which causes the young boy who is just learning to swim and dive to place a large stone on the end of his self-made spring-board in order that when he walks out on the unsupported end the opposite end will not fly up and cause him to fall in the water. In other words, the danger which caused the injury to defendant in error was not a hidden or latent one, but an obvious danger, spring from simple, natural and universal laws of which he was bound to take notice.

Defendant in error cannot make a case for a jury by testifying that he did not know this fact. The trial court in denying a motion for new trial well said (23):

"Nor am I entirely satisfied that the plaintiff

did not assume the risk. While the work in which he was engaged was dangerous it was by no means complicated. It was the duty of the plaintiff and a fellow-workman to remove from the cars such loose logs as might be left after the great body of logs had been removed by means of a crane. In the instance in question, three logs remained on the car, scattered about in an irregular and disorderly way. The end of one of these logs extended out beyond the body of the car. The plaintiff threw another log out into this unsupported end and naturally, if not inevitably, the other end swung around and precipitated him off the car and into the water. It might seem that he should have appreciated this. The laws of gravitation are amongst our earliest conceptions. We can see their effect if we cannot see the force that attracts (25) atom to atom. It seems he should have known that if he threw a log onto the end of the log hanging out over the side of the car that the other end of the log was a dangerous place to remain."

It must be conceded that had the defendant in error been an adult there could be no recovery in this case, for the reason that under well-settled principles he must be held to assume the risk as a matter of law. Does the fact that he was a minor under the facts disclosed by this record change the rule? We contend that it does not.

In *Kelly vs. Barber Asphalt Co.*, 20 S. W. 271, the Court of Appeals of Kentucky in a case where a minor 17 years of age was injured, in speaking of the risk which a minor assumes said:

“In performing the duties of his place, a servant is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly. If he fails to do this, the risk is his own. He is bound to use his eyes, and if he fails to do so he cannot charge the consequences upon the master; and this rule applies to minor servants.”

In *Cudahy Packing Company vs. Marcan*, 105 Fed. 645, the Circuit Court of Appeals for the Eighth Circuit had before it the question of the risk which a minor assumes. In that case the plaintiff, a minor of seventeen years of age, was working at a machine called a “hasher” and he was standing upon a block which was placed upon the floor. In some manner the block slipped and the plaintiff had his hand caught in the machine and injured. The court held that he assumed this risk as a matter of law and in its opinion said:

“A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care and prudence. A minor assumes the ordinary risks and dangers of his employment that he actually knows and appreciates, and those which are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care and prudence, know and appreciate them to the same extent as an adult. By entering upon and continuing in the employment he assumes these risks and dangers, and no negligence can be charged to the master, and no liability can be fastened upon him, because he fails to give notices or warnings of or

to remove these common risks of the employment. *Manufacturing Co. v. Erickson*, 55 *Wed.* 943, 946, 5 *C. C. A.* 341, 344, 12 *U. S. App.* 260, 265; *Pressed Brick Co. v. Reinneiger* (*Ill. Sup.*), 29 *N. E.* 1106, 1107; *Dowling v. Allen*, 74 *Mo.* 13, 16; *Railway Co. v. Valirius*, 56 *Ind.* 511, 518; *Buckley v. Manufacturing Co.* (*N. Y. App.*), 21 *N. E.* 717; *Railway Co. v. Frawley* (*Ind. Sup.*), 9 *N. E.* 595, 598; *Engine Works v. Randall*, 100 *Ind.* 293, 298, 300; *Berger v. Railway Co.*, 39 *Minn.* 78, 38 *N. W.* 814; *Sullivan v. Manufacturing Co.*, 113 *Mass.* 396; *Fones v. Phillips*, 39 *Ark.* 17, 38."

The rule as to the duty of the master to warn the servant is aptly stated in 1 *Dressler's Employers' Liability*, Sec. 98, as follows:

"In the absence of anything to show the contrary, the latter has a right to assume that the servant knows those facts of common experience with which ordinary persons of his age and experience are familiar—such matters as are within common observation and are according to natural law. He has also the right to assume that his servant will exercise reasonable care, under the circumstances, to inform and protect himself."

In the case of *St. Louis Cordage Co. v. Miller*, 126 *Fed. Rep.* 495, in passing upon the question of the risk which a minor assumes, the court said:

"The record in the case at bar has been searched in vain for any fact or testimony adequate to withdraw it from the principles of law established by this strong current of decision, or to distinguish it from the cases which have been cited to illustrate the rule. This plaintiff was a young woman 20

years of age. The presumption is that she was possessed of ordinary intelligence and ability. She had been at work in factories for more than a year, and in the establishment of the defendant for more than six months. She knew that the gearing which injured her had been covered before Christmas, and that it was uncovered from that time until she was injured on February 13, 1902. She had worked at this machine by the side of the exposed mashing cogs from 10 to 15 minutes every day during the six weeks that they remained uncovered. She testified that she did not know that it was dangerous to run the gearing uncovered, but she knew the action of the lever, the greasy condition of its handle, its proximity to the mashing cogs, and she could have no more failed to know and appreciate that the revolving cogs would crush her hand if she permitted it to slip between them than she could have failed to appreciate that boiling water would scald or fire would burn. *One cannot be heard to say that he does not know or appreciate a danger whose knowledge and appreciation are so unavoidable to a person of ordinary intelligence and prudence in a like situation.* King v. Morgan, 48 C. C. A. 507, 109 Fed. 446, 448; Moon Anchor Consol. Gold Mines v. Hopkins, 49 C. C. A. 347, 353, 111 Fed. 298, 304; Sullivan v. Simplex Electrical Co., 178 Mass. 35, 39, 59 N. E. 645; Buckley v. Mfg. Co., 113 N. Y. 540, 21 N. E. 717. The machinery, the cogs, the slippery lever, and their relation to each other, were open, visible, known. There was nothing recondite, imperceptible, uncertain, in the danger impending from them. It was plain and certain that if the employe permitted her hand to slip between the revolving cogs that hand would be injured. The defect of the unguarded gearing was obvious, the danger from it was apparent, and, without a disregard of the rules to which we have adverted and the decisions of the Supreme Court

and of other courts of the country to which reference has been made, there is no escape from the conclusion that the evidence in this case established without contradiction or dispute the facts that the plaintiff, by continuing in her employment without complaint, in the presence of an obvious and open defect and of a plain and apparent danger, assumed the risk of the injury which she sustained, so that she never had any cause of action against the defendant; and the court below should have so instructed the jury. The judgment below is accordingly reversed, and the case is remanded to the Circuit Court for a new trial."

In *Hesse v. National Casket Co.*, 52 Atl. 384, the plaintiff, a boy of sixteen years of age, was injured while working with a circular saw. Plaintiff had only been at work at the machine five days when he was injured, his injury being caused by the bench upon which he was working tipping over, thereby causing him to lose his balance, causing him to fall towards the saw, thereby bringing his hand in contact with the saw.

In holding that the plaintiff assumed the risk, in the course of its opinion the court said:

"If the accident resulted from the plaintiff having of his own volition moved too near the end of the bench, the master is equally relieved from responsibility. The fact that the bench would tip over if a person standing upon it should move beyond its center of gravity, was perfectly obvious, and the plaintiff, although a minor, was chargeable with notice of that fact. He was old enough to fully appreciate the danger of having the bench tip,

as well as the likelihood of its tipping if he stood too near to one or the other of its ends, and consequently took these risks upon himself, to the same extent as a person of more mature age. *Dunn v. McNamee*, 59 N. J. Law, 498, 37 Atl. 61."

In *Carriere v. R. McWilliams, Limited*, 29 South. 333, the Supreme Court of Louisiana announces the following rule with reference to minors:

"The employe, who is 18 years of age, has not, on that account alone, a greater right to recover damages for an injury than one of age. He was old enough, and had had experience enough, to judge of the danger for himself."

In *Bohn Manuf'g. Co. v. Erickson*, 55 Fed. 946, in passing upon the duty of the master to warn, and the risks which a minor assumes, the court said:

"SANBORN, Circuit Judge (after stating the facts): It is the general rule that a servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care. He does not assume latent dangers known to the master that are actually unknown to him, and that one of his capacity and experience would not have known by the use of ordinary care. It is the duty of the master to notify the servant of such dangers. Obviously the line between dangers apparent and latent varies with the varying experience and capacity of the servants employed. Risks and dangers that are apparent to the man of long experience, and of a high order of intelligence, may be unknown to the

inexperienced and ignorant; hence, if the youth, inexperience, and incapacity of a minor who is employed in a hazardous occupation are such that a master of ordinary intelligence and prudence would know that he is not aware of or does not appreciate the ordinary risks of his employment, it is his duty to notify him of them, and instruct him how to avoid them. This notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence and sagacity would give under like circumstances, for the purpose of enabling the minor not only to know the dangerous nature of his work, but also to understand and appreciate its risks and avoid its dangers. *They should be governed, after all, more by the experience and capacity of the servant than by his age, because the intelligence and experience of men measure their knowledge and appreciation of the dangers about them far more accurately than their years.* Pressed Brick Co. v. Reinneiger (Ill. Sup.), 29 N. E. Rep. 1106, 1107; Dowling v. Allen, 74 Mo. 13, 16; Railway Co. v. Valirius, 56 Ind. 511, 518; Buckley v. Gutta Percha Co. (N. Y. App.), 21 N. E. Rep. 717; Railway Co. v. Frawley (Ind. Sup.), 9 N. E. Rep. 595, 598. On the other hand, no duty rests upon the master to notify the minor of the ordinary dangers of his occupation that are so open and apparent that one of his age, experience, and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate them. No duty rests upon him to notify the minor of the ordinary dangers of his employment that the latter actually knows and appreciates. As to these dangers and risks that he actually knows and appreciates, and as to those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them, the minor is governed by the same rules as the adult. He assumes

these risks by entering upon or continuing in the employment, and no negligence can be charged to the master, and liability can be fastened upon him, because he fails to give futile notices and warnings of these dangers, which the minor knows and appreciates, or ought to know and appreciate. *Engine Works v. Randall*, 100 Ind. 293, 298, 300; *Berger v. Railway Co.*, 39 Minn. 78, 38 N. W. Rep. 814; *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Fones v. Phillips*, 39 Ark. 17, 38. Thus, if a master employs a boy of ordinary intelligence, 15 years of age, to work upon the roof of a building, and he steps off and falls to the ground, the master can not be charged with negligence because he did not notify him that his body would be forcibly drawn to the earth if he stepped out into space. If a blacksmith employs such a boy to assist him about his forge, and he places his hand in the fire and burns it, the master is not chargeable with negligence because he did not notify the boy that the fire would burn his flesh. These dangers are patent, and no boy 15 years of age, of ordinary capacity, would fail to appreciate them. And if, in the case at bar, the plaintiff, after entering upon his work at the relishing machine weeks before, after repeatedly seeing the revolving knives cut the wooden rails, permitted his hand or his coat to come under those knives, uninfluenced by the latent danger from the suction of which he was not aware, the defendant cannot be charged with negligence, and made liable here, because it did not notify him that those knives would cut his fingers, and tear and draw his clothes, if he placed them within their reach. These dangers were apparent. A boy of his age and intelligence, with the experience he had after working in that factory four months, and at this machine at frequent intervals for several weeks, must have known and appreciated them."

In the case at bar we contend that the age, intelligence

and experience of the defendant in error was such that it was wholly unnecessary for the master to inform him that if he should roll one log upon the unsupported end of another log that the latter would probably swing around and hit him, because this risk was open and obvious and a person of ordinary prudence, of the age and capacity of the defendant in error, must be charged with full knowledge of this fact as a matter of law. There was nothing complicated about the work in which defendant in error was engaged. It cannot be contended that it was a hazardous employment. There was no complicated machinery being used, and it is nowhere alleged in the complaint that the master failed to warn the defendant in error of any danger or that there was any hidden danger in connection with the work of which the defendant in error was not fully informed.

In the case of *Federal Lead Co. v. Swyers*, 161 Fed. 687, the court announced the following rule, with reference to the risk which a minor assumed:

“Where a servant was between 19 and 20 years old, sound in body and mind at the time he was injured, and possessed of the knowledge and experience of an adult, he was chargeable with the consequences of such knowledge, and the fact that he was under 21 years of age was not material in determining whether he assumed the risk of the dangers he involuntarily encountered in the operation of defendant’s machinery.”

In the case of *Utah Consol. Mining Co. v. Bateman*, 176 Fed. 57, at p. 63, the court, in passing upon risk which the servant assumes, said:

“While it is the duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work, and reasonably safe appliances for him to use, and while, unless he knows, or the fact is obvious, that this duty has not been discharged by the master, he may assume that it has been, and may recover for any injury resulting from the master’s failure to discharge it, yet he assumes all the ordinary risks and dangers of the employment upon which he enters and in which he continues, including those resulting from the negligence of his master which are known to and appreciated by him, and those which would have been known to and have been appreciated by a person of ordinary prudence and care in his situation. *Nor can a servant be heard to say that he did not appreciate or realize the danger when the defect or negligence was obvious and the dangers would have been apparent to an ordinarily prudent person of his intelligence in his situation.* *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 501, 509, 511, 61 C. C. A. 477, 483, 491, 493, 63 L. R. A. 551; *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 528, 61 C. C. A. 506, 510; *Lamson v. American Ax & Tool Co.*, 177 Mass. 144, 145, 58 N. E. 585, 83 Am. St. Rep. 267; *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35, 39, 59 N. E. 645; *Chicago, Milwaukee & St. Paul Ry. Co. v. Benton*, 132 Fed. 460, 462, 65 C. C. A. 660, 662; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 67, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Chicago, Great Western Ry. Co. v. Crotty*, 141 Fed. 913, 915, 73 C. C. A. 147, 149, 4 L. R. A. (N. S.) 832; *Burke v. Union Coal & Coke Co.*, 157 Fed. 178, 180.”

In the case of *Slady v. Marinette Lumber Co.*, 83 N. W. 514, the plaintiff was injured while employed by the defendant rolling logs through a trough on iron skids and down these skids to a saw.

In holding that the plaintiff because of his age and experience had full knowledge of the danger incident to the doing of the work in question, the Supreme Court of Wisconsin, said:

“With his age and experience, it is idle to say that the plaintiff did not know that, when logs were thrown by the eccentric from the log trough onto the log deck, they would roll down on the skids, at least to the first drop mentioned, and that, if they were started down the skids from such first drop, they would roll down, at least to the second drop, where the skids descended back towards the trough, with the liability of going to the end of the skids and against the carriage, if it was there, and over the end of the skids into the path of the carriage, if it was not there. Such would necessarily be the result from the condition of the skids and the force of gravity. The condition of the skids was open and obvious to the plaintiff, and such as he was bound to recognize, as well as the force of gravity. There was nothing obscure, uncertain, or complex in the situation. As found by the trial court, it appears from the uncontradicted evidence that the defendant’s log deck, with its appliances, was substantially the same as those in common use. Such being the conditions, we must hold, as a matter of law, that the plaintiff assumed the risk. See cases cited in *Helmke v. Thilmany* (decided herewith), 83 N. W. 360, and *Renne v. Leather Co.*, Id. 473.”

In the case of *Helmke v. Thilmany*, 83 N. W. 360, the

plaintiff was a minor, sixteen years of age, and was injured by being caught in the machine at which he was working.

In holding that the minor assumed the risk, the court said:

“Here, the plaintiff, while putting his coat on, unnecessarily backed up against the gearing, which he admits he knew to be dangerous. This court has repeatedly held that the true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger. *Luebke v. Machine Works*, 88 Wis. 442, 60 N. W. 711; *Craven v. Smith*, 89 Wis. 121, 61 N. W. 317; *Casey v. Railway Co.*, 90 Wis. 113, 62 N. W. 624; *Herold v. Pfister*, 92 Wis. 417, 66 N. W. 355; *Klatt v. Lumber Co.*, 92 Wis. 622, 627, 66 N. W. 791; *Roth v. Manufacturing Co.*, 96 Wis. 615, 71 N. W. 1034; *Larson v. Knapp, Sout & Co.*, 98 Wis. 178, 73 N. W. 992. It has also been repeatedly held that where it appears from the undisputed evidence that the defect or danger is open and obvious, and such as under the circumstances ought to have been known and comprehended by the plaintiff, that he will be held to have assumed the risk as a matter of law. *Id.* Such appears to be the case at bar, and hence the trial court correctly held that the plaintiff assumed the risk. The judgment of the circuit court is affirmed.”

In the case of *Dahlke v. Illinois Steel Co.*, 76 N. W. 362, with reference to the risk which an employe assumed, the court said:

“The duty to instruct does not go so far as to require the master to acquaint the employe with every possible danger to which he may be subjected in the course of his employment. The master has a right to assume that the servant will see and appreciate those dangers which are open and obvious to a person of ordinary comprehension; also that other servants associated with him in the common employment will exercise ordinary care and prudence; also that tools which are furnished will not be so used as to be unreasonably or unusually dangerous, or that a place which is reasonably safe will be made unsafe by the improper conduct of those who are required to work there, or their fellow servants; and as to all such matters the employe assumes the dangers as a part of his contract of employment. Such contract, by implication, includes an assumption of all the ordinary risks incident to the employment, such as the risk of a co-employe’s failing to exercise ordinary care and prudence.”

In the case of *Indianapolis Terra Cotta Co. v. Wachtetter*, 88 N. E. 853, the court in its opinion said:

“If a master sends his servant to do work in a place which the master knows to be dangerous, it is his duty to warn the servant of the danger to be apprehended, no matter how the dangerous condition originated, whether from the act or omission of the master, the act or omission of a fellow servant, or from purely accidental causes; but this rule thus broadly stated can apply only to such dangers as are actually known to the master. If such dangers are of a character that inhere to the place furnished the servant to work in, or to the things furnished the servant to work with, then it is the duty of the master to exercise ordinary care to know of their existence, and guard his servant from them; and even though he does not, in fact,

know of them, if he could, by the exercise of such care, have ascertained them, then he would be chargeable with knowledge of their existence. But if the dangers arose, not from any act or omission of the master, not from a danger inherent in the place, or with the tools and implements and machinery furnished him to work with, *but from the manner in which the servants performed their duty to the master, a transitory peril occasioned by the execution of the work, then the master is not chargeable with notice of such peril, or bound to exercise care to ascertain it, and is charged with no duty to warn his servants against it, unless he have actual knowledge of the existence of the danger at the time.* Southern Ind. Ry. Co. v. Harrell, 161 Ind. 699, 68 N. E. 262, 63 L. R. A. 460; Whittaker v. Burk, 167 Mass. 598, 46 N. E. 121; Meehan v. Speirs, 172 Mass. 375, 52 N. E. 518; Howard v. Railway Company (C. C. A.), 26 Fed. 837; St. Louis etc. v. Needham, *supra*; Chicago etc. v. Barker, *supra*; Hodges v. Standard Wheel Co., 152 Ind. 680, 52 N. E. 391, 54 N. E. 383. Here the evidence shows that the danger to be apprehended from the rick of plaster of paris falling was clearly a transitory one, occasioned by the manner in which the appellant's fellow servants piled up the sacks of plaster, and that the danger arose from the work of the servants, and not from any act of omission or commission of the master. The removal of the plaster from the car, the stacking of the sacks in the plaster room, and the work of subsequently taking the sacks from this store and emptying them into the bins for use, were minor details of the work in which appellants and its servants were engaged; and the supervision of these minor details of its business appellant insists was a delegable duty. Whether or not it was or was not we think cannot affect the result."

We contend that the manner of performing the work in this case adopted by the defendant in error and his fellow servant Rudd was the proximate cause of the accident, and that the accident was not due to any negligence whatever on the part of the plaintiff in error.

In *Ryan v. Armour*, 47 N. E. 60, the plaintiff, a minor of the age of 19 years, was injured while employed by the defendant in hanging hog tongues in a cooling room. It was alleged in the complaint that plaintiff was a youth of tender years, and that he was hired as a common laborer, and that hanging tongues on hooks was a hazardous occupation, for which he did not have the requisite skill, knowledge or experience. The negligence complained of was that the defendant set him to work at hanging tongues, without giving him any warning or instruction about the dangers of the employment, and in not sufficiently lighting the cooling room, and allowing the hook upon which he struck his hand to be turned in such a way that he was injured.

In passing upon the case, the court said:

“Plaintiff testified that he was injured in the latter part of July, 1890, about the 23d, and that he was 19 years old on October 13th, following. His evidence therefore contradicted his averment that he was of tender years, and incapable of intelligently appreciating the nature and hazards of the employment. He had passed beyond the stage of thoughtless childhood, and was not the subject of

especial care by his employers on account of his age. He testified that he was hired generally to do and did whatever the foreman directed. There was nothing said about the rate of wages, but he was paid \$1.50 a day. His employment began in May, 1890, and he worked most of the time for two months attending the door to the chill room as the men went in and out with the trucks. During that time he also did some other work, cleaning up the floors. At this time, in the latter part of July, he was sent to assist in hanging tongues. The evidence did not establish that this work belonged to a class fairly denominated hazardous or dangerous, as alleged in the declaration. Almost all kinds of work require some degree of care and observation on the part of the workman, but this operation of hanging up hogs' tongues is about as simple as any of the common avocations in which unskilled labor is employed. Besides, whatever of danger there was about it was not hidden, but was open and obvious. Plaintiff could see the hooks as well as anybody, and he worked with them, hanging up fresh tongues and taking off cold ones, all of one day, and the next day until 4 o'clock, before the accident happened. He had ample opportunity to learn all that could have been explained to him respecting the hazards attending the employment. The evidence did not prove any negligence on the part of defendants in setting him to work at hanging the tongues, or in failing to warn him that he was about to engage in a hazardous occupation, or to point out perils to which he was exposed. The cooling room was very large, and there were some gas jets in other parts of it, but in the corner where the tongues were hung the light furnished was by large kerosene lamp, that could be moved from place to place. The room was kept at a temperature of 38 to 40. There were no windows, and it was not practicable to have many lights, on account

of the heat from them. The kerosene lamp would grow dim, from smoke and moisture, by evening, so as not to give as clear a light as in the morning. But there was an entire failure of evidence that the condition of the room with respect to light contributed in any way to the injury. There was no proof that the light was not sufficient to clearly distinguish the hook, or that plaintiff struck it from inability to see it. A hook would sometimes get turned at an angle of about 45° , and this brought it half an inch nearer to the one on which plaintiff hung the tongue. In order to recover on account of this condition, it was necessary for plaintiff to prove a want of proper care and supervision by defendants, permitting the existence and continuance of such condition, or permitting a general unsafe condition of the hooks, and upon this question there was also a failure of proof. There was no evidence when the hook was turned, or of any fault in regard to it, or of any general unsuitable or insecure condition of the hooks as a whole. Under such circumstances, the fact of the hook being turned at the time of the accident was no evidence of a want of reasonable care on the part of the defendants with respect to the appliances, and the injury to plaintiff must be classed as an accident occurring unexpectedly, without the fault of any person, and not creating any liability. We think the court was right in giving the instructions directing the verdict, and the judgment of the appellate court will be affirmed. Affirmed."

In *Lowcock v. Franklin Paper Co.*, 47 N. E. 1000, the plaintiff, a minor of the age of fifteen years, was injured and alleged that the master failed to instruct him as to the danger incident to doing the work. In deciding the case, the court held that plaintiff assumed the risk, and in its opinion said:

“We perceive no sufficient distinction between this case and others which have been decided, and are of the opinion that it should have been taken from the jury. Under the circumstances described, whatever his testimony, an intelligent boy of 15 must be assumed to have known the danger of his hand being drawn in and brought in contact with the hot, inward-revolving roll. *Crowley v. Pacific Mills*, 148 Mass. 228, 18 N. E. 344; *Connelly v. Eldredge*, 160 Mass. 566, 36 N. E. 469. It is suggested that the felt was soft and flexible when at rest, and that the plaintiff may not have appreciated how it would act. But in *Stuart v. Railway Co.*, 163 Mass. 391, 40 N. E. 180, the plaintiff was held chargeable with knowledge of the danger of his hand being pulled in by hay which he was holding,—a stronger case than the present.”

In *Wagner v. Plano Mfg. Co.*, 85 N. W. 643, plaintiff, minor of the age of 15 years, was injured while trying to adjust a binder, and it was alleged that plaintiff's injury was caused by the negligence of the defendant in failing to warn plaintiff of the dangers of machines falling over.

The court held that the danger was so open and obvious that he assumed the risk as a matter of law, and there was no obligation on the part of the defendant to warn of the dangers. In its opinion, the court said:

“The question to be decided, therefore, is simply whether the danger of the machine falling over was such a danger as called for a warning on the part of Diebler before he set the plaintiff at work. Upon this question, it seems to us that the answer must

clearly be in the negative. The placing of a binder upon its trucks is an operation of a singular character to many operations which are continuously going on upon a farm, and in which boys of the plaintiff's age are frequently called upon to assist. The danger of the machine turning over, if not properly blocked up, was patent to a boy of this age as well as to a man. There is, of course, danger in any operation involving the lifting and moving of heavy articles which may lose their equilibrium, but this danger is one within the common knowledge of boys as well as men. It would not be reasonable to hold that a boy must be warned that a heavy article may fall and hurt him, if not properly supported, every time he is asked to assist in moving it. Warning is not required against obvious dangers in ordinary operations which are matters of common knowledge to all. *Bailey, Pers. Inj.*, §2730. The boy received an unfortunate and serious injury, but we are unable to see that the defendant is responsible for it upon any principle of law. Judgment affirmed."

In *American Bridge Co. v. Seeds*, 144 Fed. 605, the court quoted with approval the following rule from *Deye v. Lodge & Co. (C. C. A.)*, 137 Fed. 480, with reference to the duty of the master to furnish a safe place for his workmen:

"The master's obligation to supply a safe place for his work to be done and to keep it safe does not impose the duty of always keeping it in a safe condition, so far as its safety depends upon the proper performance of the very work which his servants have there undertaken to do. *If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation.*"

In this case the place which was furnished the defendant in error to work on was safe, and the negligent manner in which he and his fellow-servant attempted to do the work made the place unsafe, and this, under the authority last quoted, was one of the risks which he assumed.

In *Whalen v. Rosnosky*, 81 N. E. 282, the plaintiff, a boy of the age of seventeen years, was injured in opening wooden boxes, by reason of a piece of steel flying off the hatchet which he was using, and injuring his eye.

He had been given no warning of the danger, and, in holding that the plaintiff could not recover, the court said:

“There is nothing to show negligence on the part of the defendant. The tools furnished were proper. The thing he was told to do was one of the common operations of every-day life, free from complexity or complication and it was done in the usual way. Universal experience has stamped it as ordinarily a harmless act. Under the circumstances there was no duty resting on the employer to warn the employee.”

In the case of *Hardy v. Chicago, R. I. & P. Ry. Co.*, 115 N. W. 8, in passing upon the duty of the master to warn and instruct, the court said:

“Stated generally, the duty of a master to warn and instruct his employe, arises when the existence of the danger is, or should be, in the exercise of reasonable care, known to him, and the existence of

such danger is either unknown to them, or is not discoverable by them, in the exercise of reasonable care, or when the danger is such in character as not to be properly appreciated by them by reason of their lack of experience, their youth, or general incompetency or ignorance. 4 Thompson on Negligence, §4055. In taking an adult servant into his employ in a particular capacity, the master has the right, generally speaking, to presume competency on the part of such servant, and that he appreciates the dangers ordinarily incident to the work he undertakes to do. Of course, if the master knows, or has reason to believe, that the servant is ignorant, the duty to warn and instruct exists. *Yeager v. Railway*, 93 Iowa, 5, 61 N. W. 215; *McCarthy v. Mulgrew*, 107 Iowa, 76, 77 N. W. 527. It has never been considered, however, that the duty to warn and instruct exists to those dangers incident to a particular employment which are obvious. And, having regard for the character of the employment, an obvious danger is one that is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety. *Newbery v. Mfg. Co.*, 100 Iowa, 451, 69 N. W. 743, 62 Am. St. Rep. 582; *Hanson v. Hammell*, 107 Iowa, 171, 77 N. W. 839. * * * 'The master is under no duty of warning or instructing a servant as to dangers which are discoverable by the exercise of ordinary care on his part, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing that he possesses.' 4 Thompson on Negligence, §4063."

In *Mississippi River Logging Co. v. Schneider*, 74 Fed. 195, in passing upon the duty of the master to warn as to dangers which are obvious, the court said:

"Nor can it be said that the danger was a con-

cealed one, growing out of any defective machinery. It arose from the manner of operation, not because of defective machinery, and therefore was a risk incident to the business. *It is not necessary that a servant should be warned of every possible manner in which injury may occur. He must examine his surroundings, and take notice of obvious dangers and the operation of familiar laws.* It is sufficient, if he, being ignorant, be warned of the dangerous nature of the employment, and how safely to operate a dangerous appliance. Here the injury arose, not from the manner of the operation of the slab saw, but the manner in which other operatives performed or failed to perform their duties. The danger arising from such failure was necessarily incident to the employment. The servant cannot justly demand that he shall be warned against risks that are as obvious to him as to the master. *Kohn v. McNulta*, 147 U. S. 238; 241, 13 Sup. Ct. 298; *Southern Pacific Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530."

In *United States Cement Co. v. Koch*, 85 N. E. 490, the Supreme Court of Indiana, in passing upon the liability of the master where the danger arises only as the work progresses, used the following language:

"The place furnished by the master was safe until by the operation of the plant it was rendered dangerous, and, to keep it safe, it was essential that the coal dust should be kept cleaned up off the floor of the trench and pit, and this is the thing it is charged the master neglected to do. When the place furnished by the master to the servant in which to work is safe as it stands when the work begins, and the danger can only arise as the work progresses, and is caused by the work done, it is not the duty of the employer to stand by during the progress of the work to see when the danger arises. It is sufficient if he provides

against such dangers as may possibly arise, and gives the workmen the means of protecting themselves. *Durst v. Carnegie, etc. Co.*, 173 Pa. 162, 33 Atl. 1102; *Cleveland, etc. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *O'Connell v. Clark*, 22 App. Div. 466, 48 N. Y. Supp. 74; *Petaja v. Aurora, etc.*, 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505; *St. Louis, etc. v. Needham*, 67 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; 2 *Labatt's Master & Servant*, § 558. It cannot reasonably be claimed that it was the duty of the president and directors of this company, or its general officers, to go into this trench, with scoop and broom, and clean up the coal dust as it settled there from the operation of the plant. This was work which would necessarily be done by some employe of the company."

In *Anderson v. Columbia Improvement Co.*, 41 Wash. 83, plaintiff, a minor, was injured by being struck by a tree which fell against another tree and broke off a limb, which fell upon plaintiff and injured him. No instructions had been given to the plaintiff as to the dangers connected with the work. The Supreme Court of Washington in that case held that plaintiff assumed the risk as a matter of law, and in its opinion said:

"There can be no doubt but that this rule is correct, but it has no application to the facts in this case. There were no abnormal or extraordinary risks or dangers about the work which the appellant was doing which were not as open and comprehensible to appellant as to respondents. While the servant was a foreigner, unable to speak the English language, and while he had no previous experience in cutting down trees the size of the one which

caused the injury, he was a young man about twenty years of age, possessed of at least ordinary intelligence, and a fair education which he received in the old country, and he must have known that, when he cut down a tree one hundred and thirty feet long and one foot in diameter at the base, it might fall upon him, and that such tree was liable to break limbs in its descent against other trees standing near by, and that these limbs would injure him if he stood under them. Under such surroundings, he must appreciate the dangers without being specially informed thereof. 4 Thompson, Commentaries on Law of Negligence, § 4061. *Such dangers are necessarily incident to his employment. They are open and obvious to ordinary inspection. They are made by the progress of the work, and the master is not required to stand by and inform him of the things which he may see by merely glancing, or using only ordinary care for his own safety. The injury in this case clearly resulted from one of the ordinary and open risks of his employment. He therefore assumed the risk, and the master is not liable."*

In the case of *Berger v. St. Paul, M. M. Ry. Co.*, 38 N. W. 814, the plaintiff was 19 years of age, and was injured, it was claimed, by reason of the negligence of the defendant in not properly instructing him as to the dangers. The court held that there could be no recovery, and in its opinion said:

"The pieces of smoke-stack which plaintiff was running through the machine were full of rivets or rivet holes, and the edges were in places turned up, making what are designated spurs or sharp projections. If the pieces were handled with the bare hands, these spurs would cut and scratch them, so it was usual to wear gloves as a protection to the

hands. Of course, the spurs would catch the glove, as they would the naked hand. This made it necessary to take care that the glove was not caught by a spur so near the rollers that the hand would be drawn in. No skill nor experience beyond what plaintiff had was needed to know this and to exercise such care. It was not negligence to set him at work, all of the dangers of which he knew as well as any skilled mechanic could know; nor to omit to inform him of what his senses had every day informed him. So long as a master is held liable to his servant only for negligence, no case like this can justify a recovery. Order reversed.”

In *Hickey v. Taafe*, 12 N. E. 286, the Supreme Court of New York, in passing upon the question of duty to instruct, said:

“It is conclusively shown from her own evidence, already quoted, that she was aware of, and fully appreciated and understood, the dangers to be apprehended from working the machine; and it is equally clear, and from the same source of information, that she was perfectly competent to discharge this duty of feeding the machine long before the accident occurred. She had not, it is true, received any instructions as to its dangers from the defendant or his agents, as she says, but she had acquired the information, in fact, from the best of all teachers, practical experience. She knew, therefore, all that the instructions of the defendant would have imparted to her. This was enough. Being of age to appreciate, and having full knowledge of, the danger, and at the same time being competent to perform the duty demanded from her, *the fact that she was a minor does not alter the general rule of law upon the subject of employees taking upon themselves the risks which are patent and incident to the employ-*

ment. De Graff v. New York Cent. etc. R. Co., 76 N. Y. 125; Coombs v. New edford Co., 102 Mass. 572 at 585; Sullivan v. Indian Cordage Manuf'g. Co., 113 Mass. 396-398; King v. Boston & W. R. Co., 9 Cush. 112."

In the case of Buckley v. Gutta-Percha & Rubber Manuf'g. Co., 21 N. E. 717, the court said:

"It is impossible to perceive from the evidence what the defendant could have done to avoid the accident. The machine was not imminently dangerous. The hands of the plaintiff, in doing anything which he had to do or was doing about the machine, would not come within nine inches of the cogs where he was injured. It was not needful to instruct him that the cogs were dangerous, because that was obvious. He could see as well as anybody that if his fingers got into the cogs they would be crushed to pieces. He was not injured because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell, and instinctively threw out his hand to recover himself. His falling was a mere accident, and no amount of instruction or caution from the agents of the defendant would have prevented the accident, and saved him from the injury. His injury did not come from any ignorance of the machines, or of the danger to which he was exposed, but it came solely from the accident."

We contend that under the foregoing authorities the defendant in error must be held to assume the risk incident to unloading the logs from the car as a matter of law, and that any danger incident to performing this work was so open and obvious that a person of defendant in error's age, capacity and intelligence must be held

to have full knowledge of the same. The accident was not due to any negligence on the part of the plaintiff in error but was due to the manner in which the defendant in error, and his fellow-servant, threw the log off of the car and this was one of the ordinary risks incident to the work which the defendant in error assumed. They were furnished with a cant-hook and a peavy for the purpose of moving these logs (66-67) and all that was necessary in order to have avoided this accident was for these two men to move the unsupported end of this log out of the way. This was a mere detail of the work. Defendant in error was injured because of the manner that he and his fellow-servant attempted to unload these logs and not because of any negligence on the part of plaintiff in error.

(SPECIFICATION OF ERRORS 1 AND 2.)

The negligence complained of in this case as set forth in the complaint is found in paragraphs 3 and 4 (2 and 3) and consists in the following allegations:

“* * * that the night was dark and the place was unlighted, except from an electric light a long distance away, so that plaintiff was unable to see or know the position of the remaining logs upon the cars and was ordered and directed by the employee in charge of said unloading to get upon the car with a peavy and roll the said logs from said car. That while plaintiff was attempting to roll said logs from said car, and not knowing of any danger in so doing

and being unable, because of the darkness, to see the position of said logs, one thereof rolled upon the end of another which projected over the side of the car, causing the other end thereof to tip up with great force, striking the plaintiff * * *

“That plaintiff at the time of the happening of said accident was of the age of 17 years and inexperienced in this character of work, and entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation.”

Nowhere in the complaint is there any allegation that the plaintiff in error *failed to warn* the defendant in error of any danger in connection with doing the work, neither is it alleged anywhere in the complaint that the plaintiff in error had any knowledge whatever of the *inexperience of the defendant in error*.

Upon the trial of the case, the defendant in error over the objection of the plaintiff in error was permitted to introduce testimony to the effect that the plaintiff in error had failed to warn him of the dangers incident to performing the work and of his inexperience (48-49-50-51-52-53-54-108). That the trial court was of the opinion that this testimony was inadmissible under the allegation of the complaint is shown by his statement appearing on page 50 of the record as follows:

“The COURT. In a case of this kind, if I remember the rule correctly, negligence consists of two elements—one of putting an inexperienced boy to work in a dangerous place, and the other a failure to warn

him against the danger. The pleading here charges one but not the other.

“The COURT. I am inclined to allow the amendment. I am inclined to think it is necessary, but I am not certain, and the other question I will determine afterwards, as to whether or not you will be forced to go to trial. I will allow you to consult with your witnesses, if you desire.”

and again on page 51:

“The COURT. The other objection, of course, goes to the legal sufficiency of the complaint, and I presume we had better determine that question first. I may be in error as to the rule. The rule is, as I stated a while ago, where an inexperienced person is placed to work in a dangerous place two elements go to make up the negligence; first, the fact of his inexperience, and second, the failure to instruct or warn. *I think the failure to instruct or warn is a necessary element of your case. If so, of course, it would be necessary to allege it.* If you have any authorities to the contrary, I will hear from you.”

And again on page 25:

“The COURT. I was simply keeping on the safe side, Mr. Robertson. If the person who employed this man and the foreman was there at the time was present in court, I do not see why there should be any prejudice in allowing the amendment.”

On page 111 of the record the court finally passed upon the question of the admissibility of this testimony under the allegations contained in the complaint, as follows:

“Mr. FERRIS. There is one matter that your

Honor has not ruled on, as I understand it, and that is some testimony about this warning.

“The COURT. You preserved your exception. Counsel seems willing to rest on his complaint, and I will determine that question later.

“Mr. FERRIS. Very well, with that understanding.

“The COURT. *As a matter of precaution, if I was acting for the plaintiff I would amend my complaint, but if you want to stand on it, you can.*

Mr. CAIN. I think that was Mr. Robertson’s intention, but *I understand the Court can treat the complaint as amended.* (132-100).

The COURT. *No, the case will have to stand on the complaint as it exists. The testimony went in under objection. I do not want you to go into the case with any misunderstanding. I expressly stated at the time that I would admit the testimony under the objection, and if you made application to amend I would determine then whether the amendment should be allowed and what condition it should be allowed under and not otherwise.*

Mr. CAIN. I do not know whether Mr. Robertson is laboring under a misapprehension about it or not. I would like to see him a moment.

The COURT. Counsel on the other side, you will remember, stated what he expected to prove by this absent witness.”

It clearly appears from what was said by the trial court that he was of the opinion that defendant in error should ask leave to amend his complaint in order to make the

testimony with reference to warning admissible, but that the defendant in error refused to do as indicated by the trial court *for the reason that they did not desire the plaintiff in error to have a continuance because of the issue which they were not prepared to meet.* The court, in its opinion denying the motion for new trial, expressly held that the failure to warn was not alleged in the complaint and could not be inferred from any allegation contained therein. In this connection the court said (21):

“The Court is by no means satisfied with the correctness of its ruling at the trial, admitting testimony tending to show that the defendant failed to warn the plaintiff of the dangers incident to the particular employment in which he was engaged, at the time of receiving the injuries complained of. If a right of action exists in this case at all, it arises out of the fact that the plaintiff was inexperienced; that the defendant had knowledge of his inexperience, or should have had such knowledge by the exercise of reasonable diligence on its part, and that with such knowledge or means of knowledge it placed the plaintiff at work in a dangerous place without warning him against the dangers which beset him. To present such (23) an issue it must be conceded that the complaint is very loosely and very inartificially drawn. The sole allegation of negligence is contained in its fourth paragraph, which reads as follows:

‘That plaintiff at the time of the happening of said accident was of the age of 17 years and inexperienced in this character of work and entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation.’

True, it is alleged in the third paragraph that the

night was dark and the place unlighted, except by one electric light a long distance away; and in the fifth paragraph, that by reason of the negligence and carelessness of the defendant in causing the injuries to the plaintiff he was damaged, etc., but I apprehend the former allegation was inserted simply for the purpose of describing the conditions surrounding the plaintiff at the time of the injury, and the latter is a mere legal conclusion from the other facts set forth in the complaint. If it be urged at this time that the want of light was an independent ground of negligence I presume it will be conceded that the absence of light, at least, was open and apparent, even to an inexperienced youth of seventeen years. By a liberal and forced construction it might be inferred from the averment in the fourth paragraph 'that the plaintiff entered the employ of the defendant with the understanding that he was to be engaged in a less hazardous occupation,' that the defendant had knowledge of his inexperience, *but a failure to warn cannot be spelled out of the complaint by the most latitudinarian rule of construction.*"

The question here presented as to the admissibility of this testimony has been passed on by the courts in the following cases:

In the case of *Indiana Mfg. Co. v. Wells*, 68 N. E. 319, the plaintiff was a minor of the age of 15 years, and alleged in his complaint that he was inexperienced in mechanical labor, and construction and operation of machinery, and incompetent to judge of the dangers incident thereto, which appellant knew, but the complaint failed to allege that the defendant was negligent in failing to instruct the plaintiff of the danger of working with the

machine in question. In passing upon the case, the court said:

“The pleading contains no charge of negligence in failing to instruct appellee how to operate the machine and avoid danger. The averments that appellee was 15 years old, inexperienced in mechanical labor, and incapable and incompetent to judge of the danger incident to the operation of such machinery, do not supply the place of an averment of negligent failure to instruct appellee in the use of the machinery. The presumption that appellant did its duty, and did instruct him, is of equal weight with the presumption that it did not instruct him. From the facts averred, the inference does not necessarily follow that appellant negligently failed to instruct appellee. The pleading does not present any issue of negligence because of failure of appellant to instruct appellee in the use of the machinery.”

In *Louisville & N. R. Co. v. Wilson*, 50 So. 188, the Supreme Court of Alabama had before it a question similar with the one here involved.

In that case it was alleged that the defendant negligently failed to properly and sufficiently warn or instruct the plaintiff of the danger in connection with the work; that he was a youth, and inexperienced, and, therefore, it was dangerous for him to work at all with the machine, without proper or sufficient warning as to the danger thereof. This count in the complaint was demurred to in the court below, on the ground that there was no allegation that defendant knew of plaintiff's youth and inexperience. The lower court overruled the demurrer, and upon appeal the Supreme Court held that the complaint was defective because of the failure to allege that the defendant had knowledge of the inexperience of the plaintiff.

In the case of *Fulwider v. Trenton Gas, Light & Power Co.*, 116 S. W. 508, in passing upon a question of a failure to allege inexperience upon the part of the injured party, the court said:

“Learned counsel make a showing of marked industry in citing authorities sustaining their abstract proposition of law; but the trouble in this regard is manifest as well as manifold. At the very door of their contention, they are met with the controlling proposition that they do not allege in their petition that their father was an inexperienced engineer. They do not allege there were hidden dangers connected with the stopping of defendant’s engine off center, nor do they allege that their father’s duty was to stop it off center. They make no allegation to the effect that there was a peculiar way to stop this engine off center and peculiar and unknown dangers incident to that way. So their petition is as dumb as an oyster on any issue relating to the duty to instruct their father, or a breach of that duty. To the contrary, they rested their case on their pleading on an entirely different theory, and they may not now, with insight sharpened by misfortune, mend their hold on appeal and convict the trial court of error on such amended hold. If plaintiffs desired to recover on the ground of inexperience or hidden danger, or the necessity of warning, or instructions and the negligent failure to warn and instruct, they should have raised those issues by appropriate averments in their petition. *Potter v. Knox Co. Lumber Co.*, 146 Ind. 114, 44 N. E. 1000; 13 Ency. of Pl. and Pr., pp. 900-901.”

In the case of *La Porte Carriage Co. v. Sullender*, 75 N. E. 277, the court said:

“The fact alone that appellee was 14 years of age will not raise or justify the inference that he did not know or appreciate the risks of his employment and was not qualified by experience to judge of the character and hazard of the work which he had undertaken to perform. In order to have properly charged appellant with a neglect of duty in not giving proper instructions or warnings, facts should have been alleged to establish appellee’s ignorance and inexperience to judge for himself as to the character and perils of his employment, and that appellant with knowledge thereof, either actual or constructive failed to give him the necessary warning and instructions. These were essential elements which the pleading should have disclosed. *Louisville etc. R. Co. v. Frawley*, 110 Ind. 18, 9, N. E. 594; *Brazil etc. Co. v. Young*, 117 Ind. 520, 20 N. E. 423; and cases cited; *Brazil etc. Co. v. Gaffney*, 119 Ind. 455, 21 N. E. 1102, 4 L. R. A. 850, 12 Am. St. Rep. 422.”

The principle herein involved was passed upon in the case of *Knahtla v. Oregon Short Line & U. N. Ry. Co.*, 27 Pacific, 91, in which case the complaint alleged that the defendant was negligent, in that it allowed a certain bridge to become out of repair, and to remain in an unsafe condition. It was held that there could be no recovery, on the ground that the bridge was originally improperly constructed.

In its opinion the court said:

“The plaintiff cannot aver negligence in one particular, and on its trial prove that defendant was negligent in another particular. The object of a complaint is to apprise the court and opposite party

of the facts relied upon for a recovery so plainly that the defendant may be prepared to meet them. This object of a pleading would be entirely defeated if a plaintiff had a right to aver in his declaration one ground of action, and on the trial prove another and different one. As was said by Earl, *J.*, in *Southwick v. Bank of Memphis*, 84 N. Y. 429: 'Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action, and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary.' "

In the case of *Gains & Co. v. Johnson*, 105 S. W. 381, the complaint alleged that the plaintiff was injured by reason of the failure of defendant to provide a reasonably safe place to work, and reasonably safe machinery and appliances.

In passing upon the question of whether, under such an allegation, the plaintiff could recover for failure to warn and instruct, the court said:

"The duty of warning and instruction is entirely distinct from and independent of the duty of furnishing reasonably safe premises and appliances, as much so as the duty of furnishing reasonably safe premises is distinct from reasonably safe appliances. In other words, under an averment that the premises were unsafe, a recovery could not be had upon a showing that the appliances were unsafe, any more than a recovery could be had for the failure to warn and instruct upon evidence showing that the injury was caused by defective

premises. The petition in this case did not give to the defendant, now appellant, any notice that evidence would be introduced or a recovery sought upon the ground that it has failed to warn or instruct appellee. From the most casual examination of the petition it at once appears that in the pleading the plaintiff rested his case upon the failure to furnish reasonably safe premises and appliances. It furnished no notice that a recovery would be attempted because of the failure to warn or instruct. Appellee was asked, "Did anybody connected with the distilling company employing you explain to you the danger of oiling this machinery near that sprocket wheel before you oiled it?" Over objection of counsel for appellant he was permitted to answer, 'No, sir; there was none that ever warned me that there was any danger there at all.' In the condition of the pleadings, this evidence was not competent. It is not permissible to introduce evidence supporting a cause of action or defense that is not relied on in the pleadings. *Kearney v. City of Covington*, 1 Metc. 339. The parties have the right to look to and be governed by the pleadings in preparing their case, and are not required to anticipate that during the trial issues distinct from those relied on will be asserted. Nor should instruction No. 3 have been given. The instructions should conform to and follow the pleadings. An instruction is not authorized upon an issue not made or presented in the pleadings. The principle herein announced is fully supported by the analagous doctrine laid down in *L. & N. R. Co. v. Dickey*, 104 S. W. 329, 31 Ky. Law Rep. 894; *Maysville & Big Sandy R. Co. v. Willis* (decided Oct. 31, 1907), 104 S. W. 1016; *C., N. O. & T. P. Ry. Co. v. Crabtree*, 100 S. W. 318, 30 Ky. Law Rep. 1000."

CONCLUSION.

We contend that the defendant in error assumed the risk incident to unloading the logs from the car; that the plaintiff in error was not guilty of any negligence whatever in the premises and that the accident was due to the careless and negligent manner in which the defendant in error and Roy Rudd unloaded the logs; that the trial court erred in admitting testimony over the objection of plaintiff in error as to a failure to warn and as to the inexperience of defendant in error. For these reasons we ask that the judgment be reversed and a new trial granted.

Respectfully submitted,

EDWARD J. CANNON,

GEORGE M. FERRIS,

CHARLES E. SWAN,

Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT

POTLATCH LUMBER COMPANY a
Corporation,

Plaintiff in Error,

vs.

J. J. O'CONNELL, A MINOR, BY
CATHERINE M. O'CONNELL, his
Guardian ad Litem,

Defendant in Error.

No. 2281.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE BY DEFENDANT IN ERROR.

Counsel for plaintiff in error in their statement of the case omit to state fully the facts which surrounded the receiving of the injuries upon which this action is based, and to quote certain material parts of the testimony of defendant in error, part of whose testimony they quote.

In the first place, since inexperience is one of the grounds of the action, it is well to note that, to the best knowledge of the defendant in error,—and there is no contradicting testimony on the point—this was the third night that he was so employed in unloading logs, and that he was so engaged not over an hour and a half to two hours on each of the preceding nights (40-41-64), and that the defendant in error was a boy of the age of 17 years at the time of receiving the injuries complained of.

Next, the injuries were received at about 10:30 or 10:45 o'clock at night; that the night was dark and there was a very insufficient arc light some 150 or 200 feet away (41); that there were ice and snow on the car and it was very slippery under foot on the car in question (69); that there were three or four logs,—defendant in error was not certain which number—left on the car in a disorderly and promiscuous manner (67); and that the logs were sixteen or eighteen feet in length (68-69), two of them being about twelve inches in thickness and one about eighteen inches (66).

Further, to show material circumstances surrounding the incident, we quote the following from the testimony of the defendant in error (67):

On cross examination:

Q. In other words, you took a look at the logs and decided you would unload that one you have up there on the edge; is not that a fact?

A. I did not decide; I was told to.

Q. Who told you?

A. The foreman.

Q. And he did not tell you to unload that particular one first, did he?

A. Yes, sir.

Q. He pointed that one out to you?

A. He says, "Get them logs off of there and that one over on the other side will come off first."

We quote the following from the direct testimony of defendant in error (44-45):

Q. I now hand witness a flat board with six skids upon it for the purpose of further testifying at this time and illustrating the testimony. Now, I wish you would go on in your own way and illustrate what you mean. Just illustrate the whole matter anyway you want to.

A. (Illustrating). It has the same purchase on there as it has on the other place (indicating), and in the crane drawing this here, it leaves this here straight up; it throws the logs around in all shapes, and the night that I was hurt this cable being on the other end here, it would throw the logs—in other words, this being filled in with snow and this log, if I remember right, was about 16 or 18 feet, and it was held something like that there and caught there, and we tried it and it caught down there on us again, in here, and when it went off it caught the end of that log, and the weight of it being not sufficient to throw that log up and around off the car, this log striking me, I was standing in here, right inside of this bunk, knocking me in the pond on my head."

Again quoting from the defendant in error's direct testimony (48):

Q. * * * State whether or not at the time you rolled and was working on these logs the light was so that you could see exactly how they laid one with relation to the other.

A. *I could not.*

Q. I will ask you to state whether or not you knew prior to rolling the log off that it would strike the other log in any way.

MR. FERRIS.—If the Court pleases that is objectionable as calling for a conclusion of the witness.

The COURT.—He may state whether he saw the other logs there.

A. I saw the other logs there, but did not see—that is, did not see the condition they would fall in.

Further, on cross examination (73):

Q. What did you think would happen if this log in falling off struck the end of another log?

A. I did not think it could fall off; that is, I thought it would roll straight off,—would have been my opinion of it.

While the printed page cannot convey impressions that are as clear and distinct as the oral testimony given in the case, especially since a model was used to illustrate the position of the logs, the snow and the car, and the way in which the first log rolled off, and the manner in which the injuries were received, yet it is undisputed that the temperature on this night was five or six below zero; that the night was dark; that there was a steam rising from the pond making a fog (43); that the arc light was insufficient; that the foreman ordered this defendant in error and one Roy Rudd to remove this particular log first; that the logs were scattered in an irregular and disorderly way on the car; that the relative position of these three or four logs was not visible to the defendant in error; that the defendant in error and Rudd loosened the first log by means of their cant-hooks, or peavys (66-67), from the position in which it was caught; that they rolled it with some difficulty a short distance and that it became caught again and was held fast; that they loosened it again, and that as it

rolled off, it caught the end of another log which extended beyond the body of the flat car an unstated distance, throwing the latter log upward and around in such a way as to strike the defendant in error and to precipitate him into the pond (44-45-48).

SPECIFICATION OF ERROR BY PLAINTIFF IN ERROR.

The principal errors specified by plaintiff in error are (1) that the risks of the employment, even in a situation like that outlined above, were open and obvious, and that the defendant in error must be held as matter of law to have assumed them (pp. 8 and 11 of brief of plaintiff in error); and (2), that testimony relative to a failure to warn was received over the objection of counsel for plaintiff in error.

ARGUMENT AND AUTHORITIES. (SPECIFICATION OF ERRORS 3 AND 4).

Since opposing counsel discuss Errors 3 and 4 before considering Errors 1 and 2, we will do likewise.

Counsel for plaintiff in error argue that the danger at the time defendant in error received his injuries was most open, apparent and obvious. They compare the situation to a spring-board. But if this log had moved upward in the manner of an improperly constructed spring-board, there would have been no injuries sustained. It was the violent upward and side-wise movement of this log that caused the boy to be precipitated into the water. There are several reasons why the defendant in error could not tell beforehand

whether or not this log would swing upward and around and strike him.

Whether the log would tip up at all or not depended upon whether the weight of the first log, added to the weight of the unsupported end of the second, was greater than the weight of the portion of the second log remaining on the car, in inverse proportion to the length of the two ends; that is, if there were only two logs on a car, and one projected over the end of the car, the length of the unsupported end being, for example, in the ratio of one to four to the length of the supported end of the log, then the weight on the unsupported end, in order to tip the other end up in the least, would have to be in the ratio of four to one,—four pounds on the short end to one pound on the end remaining on the car. It is the principle of the lever. The edge of the flat car is the fulcrum. The portion of the log on the car is the long end of the lever; the portion of the log off the car is the short end of the lever. This seems quite simple, and it seems that it would not be very difficult to tell at least, whether the supported end of a log would tip up or not, if one is working in broad day-light, if there are only two logs on the car, and the unsupported end of one of them is extending a known distance beyond the edge of the car and at right angles to it, and the other log rolls straight off it with its entire weight on the first log; and there are no other circumstances than these. But is that this case? Was the relative position of the three or four logs remaining on the car known? It

was not. Was the end of the log which was on the car under another log or not? It was not known. If it had been, it undoubtedly would not have swung around at all. Was the light sufficient? It admittedly was not. Was it known how far the second log extended beyond the edge of the car? Was it known what resistance the snow and ice would have in the way of preventing the second log from swinging around side-wise? Would the entire weight of the first log be thrown upon, or rolled upon, the unsupported end of the second? The entire weight of the first log might tip the second up; part of the weight of the first log might not. Further, the momentum of the first log, as it was rolled, or was thrown, over the unsupported end of the second, was an element in determining whether the second would be moved from its original position or not. The momentum of a swiftly moving train might cause a bridge to fall; the same train moving slowly might pass over the bridge in safety.

There is an inconsistency between the Specifications of Error by counsel for plaintiff in error and their argument that shows the true state of the possibility of danger. In their Specifications of Error (III. p. 8 of brief), they complain that the Court erred in refusing to hold that the risks incident to the work, which included the risk at the time the injuries were received, were open and obvious, and that the defendant in error therefore assumed the same. And in part of their argument (p. 10), they urge that the position where defendant in error stood

was one of obvious and certain danger. But on Page 9 of their brief, they say that 'the latter log would undoubtedly swing around *in some direction* and *probably* hit him.' That is the point. There was a probability or possibility that the boy would be hit. He was not in the presence of obvious or certain danger. The log might swing around and hit him, and it might not. Counsel say, 'In some direction.' But, in what direction? It was not obvious or clear in what direction it would swing, if it swung at all. Counsel are mistaken when they state that 'undoubtedly' the log would swing around. The log might not be moved at all; it might be thrown upward, perpendicularly, after the fashion of an improperly constructed spring-board which counsel refer to; or it might be thrown upward and around in one direction or the other, depending upon the angle in which it was struck, or in which the other log rolled off it, the weight of the other log, and the various other circumstances mentioned in the paragraph above. There was a possible danger for the defendant in error to stand where he did; or, as counsel for plaintiff in error express it, there was a 'probability' that he would be hit. But that lacks much of being open, obvious and certain danger. An open and obvious risk or danger and a probable danger are not the same thing by any means. With regard to this question as to whether the risk was an open and obvious one, and whether the defendant in error assumed it, the trial court well said (23), denying the motion for a new trial and for judgment notwithstanding the ver-

dict, that *“a jury of twelve men has found to the contrary, and I am not prepared to say that I am so far satisfied that their conclusion is erroneous as to justify me in directing a judgment for the defendant (plaintiff in error here).”*

There is another consideration that should not be lost sight of, namely, that, while there were two experienced men who saw this minor take the position on the car which he did, yet there is no intimation that either of them recognized that he was in even any possible danger.

Under all the circumstances of the case, the verdict of the jury could be rendered, not only in the honest and reasonable exercise of their judgment, which is all that is required, but that verdict was eminently correct.

Counsel for plaintiff in error quote many cases in an attempt to show that, as a matter of law, defendant in error should be held to have assumed the risk. These cases are distinguishable from the one at bar.

At page 12 of the opposing brief is cited *Cudahy Packing Co. v. Marcan*, 105 Fed. 645, which states the law with respect to minors as follows:

“A minor assumes the ordinary risks and dangers of his employment that he actually knows and appreciates, and those which are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care and prudence, know and appreciate them to the same extent as an adult.”

But in the case at bar, the danger was not so open and apparent that the defendant in error appreciated it, or should have appreciated it, nor so

apparent that the two experienced adults associated with him appreciated it; the jury held that it was not so apparent that he should have appreciated it; and the trial court held that he was not convinced that the verdict of the jury was incorrect.

In the case cited, the slipping of the block was, no doubt, an ordinary risk which would have happened to an adult the same as to a minor.

The next case cited (p. 13), *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, was, of course, correctly decided,—that a young woman should know that ‘revolving cogs would crush her hand if she permitted it to slip between them.’

Hesse v. National Casket Co., 52 Atl. 384, cited at Page 15, was to the effect that a sixteen year-old boy should know as well as an adult that a bench would tip up if he got beyond its center of gravity. *Bohn Mfg. Co. v. Erickson*, 55 Fed. 945, cited at Page 16 of the brief, is to the effect that the danger was apparent to a boy, after entering upon his work at a relishing machine weeks before, and after repeatedly seeing the revolving knives at work that if he permitted his hand or his coat to come under those knives, they would cut his fingers, and tear and draw his clothes. Clearly, the decision is correct; an opposite opinion would be nonsense.

Likewise, the cases of *Utah Consol. Mining Co. v. Bateman*, 176 Fed. 57, *Slady v. Marinette Lumber Co.*, 83 N. W. 514, and *Helme v. Thilmany*, 83 N. W. 360 (cited at pages 20, 21, of the brief), are cases

where the danger was open and obvious and there was nothing obscure or uncertain about it.

At page 25 of the brief is cited *Bryan v. Armour*, 47 N. E. 60, but in that case the Court said:

“There was no proof that the light was not sufficient to clearly distinguish the hook, or that plaintiff struck it from inability to see it.”

All that case holds is that a master is not liable to a minor of the age of 19 years in case the minor strikes his hand against a sharp hook when there is no inability to see it.

Wagner v. Plano Mfg. Co. 85 N. W. 643, cited at page 28 of the brief was one where a binder turned over on a boy because it was not properly blocked up. The danger was as patent to a boy as to a man.

Likewise the other cases cited by counsel for plaintiff in error to prove that the defendant in error should be held to have assumed the risk. For example, how can *Whalen v. Rosnosky*, 81 N. E. 282, cited at page 30 of the brief, where a 17-year-old boy was injured by reason of a piece of steel flying off a hatchet he was using, and injuring his eye,—how does that case throw any light on the present one? Any hatchet is liable to break and there is as much danger of it so doing in the hands of a man as in the hands of a minor, and clearly the master cannot be held liable in such a case. Again, in *Anderson v. Columbia Improvement Co.* 41 Wash. 83, cited at page 33 of the brief, the danger was as open and obvious to a minor 20 years old, that a tree which he was cutting down might fall against another tree and break off a limb

thereby injuring him, as it would be to an adult. The last three cases cited on this point at pages 34, 35 and 36 were all cases where hands or fingers were caught between rollers or cogs. All of them were injuries received from dangers that were open, apparent, obvious, certain. The lack of analogy is clear.

The following authorities show, conclusively, that this was a case for the jury.

In *Neilon v. Marinette etc. Paper Co.*, 75 Wis. 579, 44 N. W. 772, it was held that whether the danger in wiping the gearing of machinery while in motion was so apparent to a boy that *in following the foreman's instructions* he assumed the risks incident thereto, and whether he was properly cautioned as to such danger, was for the jury to decide.

The same ruling was made in *Mary Lee Coal etc. Co. v. Chambliss*, 97 Ala. 171; 11 So. 897, where the question was as to whether a railway fireman 17 years old, who had been in the company's employ only two months and had never before undertaken to throw a switch, assumed the incidental risk of throwing a switch in the regular switchman's absence, in obedience to the order of the engineer by whom he was employed, and under whose orders he was.

In *Zeigler v. Gotzian*, 86 Minn. 290; 90 N. W. 387, a boy 16 1-2 years old was ordered to wash the outsides of windows in the third story of a factory where he had been employed for five months. *Held*, for the jury to decide whether he knew the place he was required to work was dangerous, and whether he understood the risks.

In *Hinckley v. Horazdowski*, 8 L. R. A. 490 (Ill.) a boy was employed to take lumber away from a flooring machine and load it on a wagon and was injured in attempting, under orders of the foreman of the mill, to oil machinery while in motion. Recovery sustained.

In *McMillan Marble Co. v. Black*, 14 S. W. 479, (Tenn.) a boy 15 1-2 years old was employed in a quarry and set to work close to a projecting rock, which, from some unexplained cause, fell and injured him. In affirming judgment for plaintiff the court said:

“He was not at fault for accepting work, under direction of his superior, so near this dangerous rock; for the projection was so patent to all that he had a right to assume that the foreman had tested it, and found it safe, and that the superintendent would not otherwise send him to such a place. To our minds, these facts abundantly sustain the verdict. The failure to test and remove this impending rock, and the placing of this young boy in such close proximity to it, are facts from which an intelligent jury may well have imputed negligence to the marble company; indeed we do not see how they could reasonably have reached any other conclusion.”

In *Felton v. Girardy*, 104 Fed. 127, an inexperienced boiler maker's helper was ordered by the foreman of railroad shops to go into the fire box of a locomotive and tighten the plug in a leaking flue of the boiler. The Court in affirming judgment for plaintiff, speaking through Justice Lurton, said:

“In determining the question of obviousness, every reasonable inference must be drawn in favor of the party against whom a peremptory instruction is asked. In view of this principle, we are not prepared to say that the dangers incident to the work which Beckert was called upon to do, and the proper mode of en-

countering them, were sufficiently obvious to justify the Court in taking the case from the jury. If he had never repaired such a leak, or worked in a situation so confining and uncomfortable as the hot fire box of an engine whose boiler was full of steam; if he, from inexperience, supposed such boiler flues to be always plugged with the driven plug, or, in the heat and discomfort of his place for working, mistook, from inexperience, a screw plug for a driven plug,—we are not prepared to say that the master is relieved from responsibility, even though very slight knowledge of this particular kind of repairing might have enabled this servant to have done this work in safety, using due care.”

In *Western Union Telegraph Co. v. Burgess*, 108 Fed. 26, plaintiff was employed as a lineman by defendant company and was directed by the foreman to climb a pole and saw it off some 40 feet above the ground. In doing the work he held to the pole with one hand above the place where he was sawing, and when the pole was partly sawed through it broke off, causing plaintiff to fall, and be injured. The Court held in that case as follows:

“It will appear from the statement of the case that there was some evidence tending to show that the defendant in error was an inexperienced servant, and was changed from the work to which he had become accustomed, and set at work which involved greater danger, without any warning or instruction as to the safest mode of doing the new work. Under such circumstances, and in this state of the case, we think the question of contributory negligence was a question of fact for the jury to determine.”

In the case of *Sink et. al. v. the Sikes Co.*, 134 Fed. 144, the frame of a saw had been jarred loose

from the floor and instead of holding it down it was tied with a rope. Employes of mature age and experience discovered this defective condition and reported it to the foreman. But the foreman ordered the plaintiff, a minor and inexperienced in this sort of work, to proceed with his work near this defective machinery. The immature servant was not aware of any unusual danger and it was held that he did not assume the risk thereof and that the question of negligence was for the jury.

The case of *The Buffalo*, 147 Fed. 304 is quite similar to the present one. The libelant was a longshoreman 22 years old and was employed to work on the wharves in loading and unloading ore boats. He was wholly inexperienced in work of this character. The night was dark. He was not at the time of his employment, nor subsequently, warned of any dangers of his occupation. He was sent with others to transfer ore from a scow to a steamer, using for the transfer a traveling crane upon the scow. As libelant stood up after filling a bucket on the scow he was struck by the crane from behind and thrown against the side of the scow, and throwing his arm over the gunwale to regain his feet it was crushed by one of the wheels of the derrick. The Court said:

"The place was manifestly a dangerous one in which to work as the nature of the accident and its occurrence would impliedly indicate. *Mather v. Rillston*, 156 U. W. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. To an inexperienced workman the dangers of the employment, as a matter of law, cannot be held to have been obvious."

In *Alaska United Gold Mining Co. v. Keating* 116 Fed. 561, it was contended that the plaintiff was guilty of contributory negligence by standing upon the bail of a bucket when going down the shaft of a mine, instead of standing in the bucket. He struck an obstruction projecting in the shaft and was thrown from the bail of the bucket and injured. The Court in affirming judgment for plaintiff said:

“With respect to the defense urged that the plaintiff was guilty of contributory negligence, it is necessary to understand what constitutes contributory negligence in a case of this character. It is the want of ordinary care and prudence on the part of the person injured by the actionable negligence of another combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. 7 Am. & Eng. Enc. Law (2d Ed.), p. 371. Assuming that the presence of an obstruction in the shaft ought to have been ascertained by the defendant before the skip on which plaintiff was riding was sent down, and that this omission was the negligence of the defendant, then it is clear that the plaintiff’s position on the skip, although it may have been dangerous, was not a proximate cause of the injury, as it did not combine or concur with the defendant’s negligence in causing the injury.”

Finally on the question as to whether or not the Court erred in refusing to hold that the defendant in error assumed this risk as a matter of law, and in refusing to hold that he was guilty of contributory negligence as matter of law we quote the following from *Texas & Pacific Railroad Co. v. Gentry*, 165 U. S. 353 (By Justice Harlan):

“‘When a given state of facts is such that reasonable men may fairly differ upon the question as

to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.' Grand Trunk R. Co. v. Ives, 144 U. S. 408, 417."

(SPECIFICATIONS OF ERRORS 1 AND 2).

Plaintiff in error complains that there was no allegation that it had any knowledge of the inexperience of the defendant in error and that there was no allegation that the plaintiff in error failed to warn defendant in error of any danger connected with the work. But the trial Court well said on this point:

"However, the foreman in charge of the work was a witness at the trial and at no stage of the case was there any intimation that a warning had been in fact given. Indeed, the third affirmative defense 'that the plaintiff at the time he entered upon the work in which he was engaged, understood and fully appreciated any and all dangers connected therewith and full appreciated the fact that the logs would roll and might injure him if he got in their path, and that in entering upon the work he assumed and took upon himself all dangers and risks incident to his employment, among which were the dangers and risks which he alleges caused the accident'—would seem inconsistent with the theory that a warning was given.

And not only is the pleading inconsistent with the theory that a warning was given, but the testimony of the foreman himself is wholly inconsistent with any such theory. (108):

"MR. ROBERTSON.—Q. Why didn't you instruct him as to his duties?

“A. Why, I probably did not think of it at the time, or something like that. *I don't know just why I did not tell him.* Probably I did tell him; I don't recollect. He said this morning that I showed him how to put the cable on the car. I don't recollect whether I did or not (129-97); probably I did. I have put men to work there and showed them how.

Q. Told them how to get the logs off and how to watch that they did not get hit when they were rolling off?

“A. Well, I told some of them; I don't recollect whether I told him or not.”

Well might the Court add with regard to the ruling admitting testimony on the failure to warn, *“Under all the circumstances, therefore, I am not prepared to say that the defendant was prejudiced by the ruling complained of.”*

With regard to the knowledge of the inexperience of the defendant in error or the lack of such knowledge, it is only necessary to point out that Assignments of Error 1 and 2 (115) make no mention of such alleged error as one on which plaintiff in error will rely in this Court; and to call the Court's attention to the fact that at no place in the record is there any intimation that there was such lack of knowledge. It is difficult to see how prejudicial error can be asserted or found in this respect.

As was said in *Press Pub. Co. v. Monteith*, 180 Fed. 356:

*“Prejudice must be perceived, not presumed or imagined. * * **

“The granting of a new trial is often a denial of justice, witnesses die or remove beyond the jurisdic-

tion of the Court and the resources of the litigants become exhausted.

“Believing as we do that the libel here was without justification or excuse and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the Courts.”

Board of Com'rs of Lake County v. Keene Five-Cents Sav. Bank, 108 Fed. 505, is as follows (Syllabus):

“Alleged errors which the record conclusively shows could not have affected the decision and judgment work no prejudice and constitute no ground of reversal.”

Lancaster v. Collins, 115 U. S. 222, holds as follows (Opinion by Justice Blatchford):

“No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made. *Deery v. Cray*, 5 Wall. 795, 803; *Gregg v. Moss*, 14 Wall. 564, 569; *Lucas v. Brooks*, 18 Wall. 436, 454; *Allis v. Insurance Co.*, 97 U. S. 144, 145; *Cannon v. Pratt*, 99 U. S. 619, 623; *Mining Co. v. Taylor*, 100 U. S. 37, 42; *Hornbuckle v. Stafford*, 111 U. S. 389, 394; S. C. 4 Sup. Ct. Rep. 515.”

The case of *Bryson vs. Gallo*, 180 Fed. 70, contains the true and correct doctrine for testing the sufficiency of the pleadings in the present case.

The Court holds in that case that:

“Under the federal conformity statute (Rev. St. Par. 914) (U. S. Comp. 1901, p. 684), which provides that the pleadings in actions at law in the federal courts shall conform as near as may be to those in the state courts, the federal courts may look

to the state statutes upon the question of the construction of pleadings in such actions."

The opinion goes further than this, even the state decisions upon questions of the sufficiency of the pleadings, or the fact of a material variance, seem to be controlling (Page 75).

To quote from the opinion:

"It is not meant to say either that the language quoted or that the language of the petition as a whole is as clear as it should have been respecting averment of violation of the primary duty of the master. * * * We may, therefore, upon such a question as this look to the Civil Code of Ohio to ascertain how such a pleading should be construed."

Then follows a section of that code which is similar to Sec. 295 Rem. & Bal. Codes of the State of Washington, namely:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

The Court continues in this language:

"Construing the language of the petition liberally 'with a view to substantial justice between the parties,' we are not persuaded that the trial court committed error of a prejudicial character in admitting the evidence in question."

Further, the Court in that case quotes a section from the Ohio code, which is the same as Section 299, Rem. & Bal. Code, and it is decisive upon the question of variance in this case. That section in our code reads:

“No variance between the allegation in a pleading and the proof, shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled that fact shall be proven to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.”

The plaintiff in error has not proven, so far as the record shows, to the satisfaction of this Court, that he has been misled by the allegation in the complaint, nor has he shown in what respect he has been misled. A full defense was made by it and the substantial rights of the parties determined by the judgment in this case.

We say in this case, as the Court said in the Bryson case, that:

“It follows that, whether amendment was necessary or not, at most there was not under the facts pointed out a material variance.”

The Federal Court then cites several Ohio cases on the question of what in that state is a material variance. The Washington statutes and decisions are determinative of what is a material variance in this case.

The following Washington cases show, beyond a question, the sufficiency of the pleading.

Collett vs. N. P., 23 Wash. 600, reads as follows:

“It is true that plaintiff did not plead want of light as a circumstance comprising negligence, but, under the well established rules this was not necessary be-

cause to compel him to do so would be, in the language of many of the cases, to compel him to plead his evidence.

“The rule is well-nigh universal that in an action for negligence the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence. 14 Enc. Pl. & Pr. p. 333 and cases cited.”

In this case the Court quotes with approval the case of *Oldfield vs. N. Y. & H. R. R. Co.*, 14 N. Y. 310, where the complaint contained but a general averment of negligence on the part of the defendant and evidence was admitted to show that there were no guards in front of the cars to prove negligence; the New York Court saying:

“The complaint avers that the death was caused by the negligence of the defendants and their agents and servants. This authorizes evidence on the defendant’s negligence or misconduct tending to produce the injury, without a more particular statement in the pleading.”

Crooker vs. Pacific Lounge & Mattress Co., 24 Wash. p. 191, states:

“It is not necessary to set out the negligent acts in detail, but a general averment that the defendant was negligent in doing or not doing the particular act complained of is sufficient.”

Albin vs. Seattle Electric Co., 40 Wash. 51, states:

“Where the only allegations in a pleading are general in their character, are not aided by averments of specific facts, but yet are sufficient as against a general demurrer, and the opposite party has not availed himself of his right to have said general allegations made more definite and certain on motion, we think a wide latitude should be allowed by trial courts

in admitting evidence. The object of all pleadings is to advise the court and the opposite party of the grounds upon which the pleader bases his right of action or defense."

The Court in this case and the opposite party were advised, and the issue was made, as to the understanding of the hazards which this minor would undergo.

Furthermore, we contend, as the Court held in the case of Bryson vs. Gallo, cited above, that Section 307, Rem. & Bal. Codes is applicable in testing the sufficiency of this pleading just as a similar section of the Ohio Code was held applicable when reversal of the judgment was sought in the Bryson case.

This section reads (Par. 307):

"The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

The Court in the Bryson case, 180 Fed. 75, in applying this section, said:

"We therefore conclude that we should consider this case as though admittedly an issue had been distinctly formulated by the pleadings alleging and denying failure of the master to supply the necessary guide lines. * * *"

The Washington Supreme Court in the case of Green vs. Tidball, 26 Wash. 338, in passing upon this section, said:

"The statute directs us to disregard any error

or defect which does not affect a substantial right of the adverse party (Bal., par. 4957, Rem. & Bal. 307), and to determine all cases upon the merits thereof, disregarding all technicalities, and to consider all amendments which could have been made as made (Bal., par. 6535, Rem. & Bal., 1752). When, therefore, a cause has been tried upon its merits, as if upon pleadings sufficient in form and substance, in which the complaining party has not been misled, and has had full opportunity to present his case, some substantial wrong, some failure on the part of his adversary to aver or prove a material matter necessary on his part to be averred and proven in order to entitle him to recover, must be shown, before this court is warranted in reversing and remanding a cause for a new trial. *A mere defect in pleading is not such a cause.* It must not only be defective, but must have operated to the substantial injury of the complainant, before that result can follow:

Irby vs. Phillips, 40 Wash. 618, states:

“The respondents were entitled to amend the complaint to correspond with the proof, and in such case this court will, on appeal, consider such amendment as made.”

Decisions of a state Court of last resort construing a state statute will be followed by United States Courts.

Tullis vs. Lake Erie, Etc. R. Co., 175 U. S. 348, 44 L. Ed. 192;

Missouri K. & T. Ry. Co. v. McCann, 174 U. S. 580; 43 L. Ed. 1093;

American Sugar. Ref. Co. v. City of New Orleans, 119 Fed. 691;

Guarantee Trust. Co. of New York vs. Galveston City Ry. Co., 107 Fed. 311;

Runnel v. Butler Co., 93 Fed. 304;

Yarrington vs. Del. & Hudson Ry. Co., 143 Fed. 565.

The purport of these statutes and Washington decisions, which are controlling in this case, is that no judgment shall be set aside unless there is a defect in the pleadings, *and* the adverse party has been misled and prejudiced thereby, *and* that amendments which should have been made will be considered as made.

The conclusion, therefore, is inescapable that in this case, even if there was a defect in the pleadings (which we do not admit, but on the other hand contend that the allegations were sufficient, the adverse party having notice in the pleadings that the case would be tried on the issues of the minority, inexperience and the understanding or information of the plaintiff as to the hazards to be encountered and the negligence and carelessness of the defendant)—even if there was a defect, the plaintiff in error has not proven that it was misled. The case was tried with a full understanding on its part of the issues involved, the plaintiff in error has not proven prejudicial injury, amendments which could have been made should be considered as made, and the judgment should therefore be affirmed.

Respectfully submitted,

ROBERTSON & MILLER,
Attorneys for Defendant in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

POTLATCH LUMBER COM-
PANY, a Corporation,
Plaintiff in Error,

vs.

J. J. O'CONNELL, a Minor, by
Catherine M. O'Connell, his
Guardian ad litem,
Defendant in Error.

No. 2281

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

*Upon Writ of Error to the United States District
Court of the Eastern District of Washington,
Northern Division.*

Comes now the above named plaintiff in error and respectfully petitions the court for a rehearing of this cause.

It is evident from the opinion filed herein that the court has failed to take into consideration all of the facts shown in the record, and that with reference to some of the facts the court has misunderstood the testimony. It is stated in the opinion that two men were present at the time of the accident, and that they

did not see any danger of defendant in error being injured.

The record in the case does not support this statement. The testimony shows that the only persons present at the time of the accident was the plaintiff and his fellow servant, Roy Rudd, both of whom were engaged in rolling off the log in question. The testimony of the foreman, Joe Loehr (Record p. 98), is as follows:

“Q. Where were you at the time of the accident?

A. I was at what we call the pump house,—where we eat our lunch nights. I was in there when Rudd came and told me the man was hurt.

Q. When who told you?

A. Rudd.”

When the foreman gave the plaintiff and his fellow servant directions to roll these three logs off the flat car, he had a right to assume they would do it in a manner which would not be dangerous for them. The plaintiff's testimony shows that neither he nor his fellow servant took any precautions whatever to ascertain how the logs in question were lying upon the car, or the effect upon the log which struck plaintiff, if it should be struck by the log which they were rolling off the car. Plaintiff's injury was the result of his own carelessness and negligence.

The court further states in the opinion filed herein that the negligence of the defendant with reference to the insufficiency of the light furnished was a question for the jury. The error in this statement lies in the fact that the jury never had an opportunity to pass upon that question. The trial court instructed the jury in

this case that the mere fact that the light in the place where the work was being performed was insufficient, was not negligence on the part of the defendant, for which plaintiff could recover. Therefore, any alleged negligence on the part of the defendant with reference to the light of the working place of plaintiff was eliminated from the case.

This court cannot now sustain the verdict and judgment in this case upon the alleged negligence of the defendant with reference to the lights which were furnished, when that ground of negligence was not submitted to the jury, and therefore did not enter into the verdict in any way. Aside from this fact it has been held in a number of cases that whether or not the light furnished was sufficient, is an open and obvious fact which the servant assumes by remaining in the employment, with knowledge of the conditions under which he is working.

In *Donovan vs. American L. Co.*, 61 N. E., 808, this question is passed upon squarely by the Supreme Court of Massachusetts, and it is there held that such a risk is assumed by the servant as a matter of law. See also

Thompson vs. Paper Co., 48 N. E., 767.

Kanz vs. Page, 46 N. E., 629.

Whittaker vs. Bent, 46 N. E., 121.

The rule of law to the effect that the servant assumes the risk of all dangers that are open and obvious, leaves no room for the contention that when the servant has worked for a number of nights under the conditions which surrounded the plaintiff in this action, it is for

the jury to say whether or not the master was negligent, for if it be conceded that there was any negligence on the part of the defendant with reference to the lighting of the place, then the condition was open and obvious and certainly understood and appreciated by the plaintiff. He therefore cannot be heard to say that he did not assume this risk. Any other rule would make the master an insurer.

In the opinion of the trial court filed in the court below, with reference to the lighting of the place, the court said (22) :

“If it be urged at this time that the manner of lighting was an independent ground of negligence, I presume it will be conceded that the absence of light, at least was open and apparent, even to an inexperienced youth of seventeen years.

The trial court having instructed the jury that the defendant could not be held liable because of the condition of the lights under which plaintiff was working, and the plaintiff having taken no exceptions to this instruction, it became the law of the case.

We therefore respectfully request that the court grant a rehearing in this case for the reasons hereinbefore set forth.

EDWARD J. CANNON,
GEORGE M. FERRIS,
CHARLES E. SWAN,
Attorneys for Plaintiff in Error.

The undersigned attorneys for defendant in error hereby certify that in their opinion and judgment the foregoing petition for re-hearing is well founded and that it is not interposed for delay.

Edward J. Cannon

George W. Davis

Charles E. Swan

Attorneys for Defendant in Error.

No. 2282

United States
Circuit Court of Appeals

For the Ninth Circuit.

ARCTIC LUMBER COMPANY, a Corporation,
Appellant,

VS.

W. H. BORDEN, GEORGE GILBERT,
CHARLES GOODALL, NORMAN McCAU-
LEY and C. W. PALMER,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Third Division.

FILED

AUG 2 - 1913

No. 2282

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARCTIC LUMBER COMPANY, a Corporation,
Appellant,

vs.

W. H. BORDEN, GEORGE GILBERT,
CHARLES GOODALL, NORMAN McCAU-
LEY and C. W. PALMER,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Third Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer of W. H. Borden.....	12
Assignment of Errors.....	251
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions and Transcript of Evidence..	22
Bond on Appeal.....	283
Certificate of Clerk U. S. District Court to Tran- script of Record.....	326
Citation on Appeal.....	279
Complaint.....	2
Decision.....	209
Decree.....	222
Demurrer of W. H. Borden to Complaint.....	9
Demurrer of George K. Gilbert to Complaint..	9
Exceptions of Plaintiff to Findings of Fact and Conclusions of Law, Signed.....	240

EXHIBITS:

Exhibit "A" to Complaint—Notice of Claim of Lien.....	5
Exhibit "A" to Answer of W. H. Borden —Notice Re Mechanics' Liens.....	16
Plaintiff's Exhibit "A"—Invoice Dated March 7, 1910, of Material Furnished N. McCauley.....	286

Index.	Page
EXHIBITS—Continued:	
Plaintiff's Exhibit "B"—Delivery Receipt, Dated March 12, 1910.....	287
Plaintiff's Exhibit "C"—Invoice, Dated March 15, 1910, of Material Furnished N. McCauley.....	288
Plaintiff's Exhibit "D"—Delivery Sheet, Dated March 31, 1910.....	288
Plaintiff's Exhibit "E"—Delivery Receipt, etc., Dated April 24, 1910.....	288
Plaintiff's Exhibit "F"—Invoice, Dated April 21, 1910, of Material Furnished N. McCauley.....	290
Plaintiff's Exhibit "G"—Delivery Receipt, Dated April 25, 1910, etc.....	290
Plaintiff's Exhibit "H"—Delivery Receipt, Dated April 25, 1910, etc.....	291
Plaintiff's Exhibit "I"—Invoice Dated April 26, 1910, of Material Furnished N. McCauley....	291
Plaintiff's Exhibit "J"—Invoice, Dated April 30, 1910, of Material Furnished N. McCauley.....	292
Plaintiff's Exhibit "K"—Delivery Receipt Dated May 20, 1910.....	292
Plaintiff's Exhibit "L"—Record of Mill- work, Dated May 30, 1910.....	293
Plaintiff's Exhibit "M"—Delivery Re- ceipt, etc. Dated June 1, 1910, etc....	293
Plaintiff's Exhibit "N"—Delivery Receipt, Dated June 2, 1910, etc.....	294

Index.

Page

EXHIBITS—Continued:

Plaintiff's Exhibit "O"—Invoice, Dated June 2, 1910, of Material Furnished N. McCauley.....	295
Plaintiff's Exhibit "P"—Invoice, Dated June 3, 1910, of Material Furnished N. McCauley.....	295
Plaintiff's Exhibit "Q"—Invoice, Dated June 4, 1910, of Material Furnished N. McCauley.....	296
Plaintiff's Exhibit "R"—Invoice, Dated June 10, 1910, of Material Furnished N. McCauley.....	296
Plaintiff's Exhibit "S"—Delivery Receipt, Dated July 8, 1910, etc.....	297
Plaintiff's Exhibit "T"—Delivery Receipt, Dated August 6, 1910, etc.....	297
Plaintiff's Exhibit "U"—Lease, Dated February 17, 1910, Between W. H. Borden and N. D. MacCauley et al.....	76
Plaintiff's Exhibit "U"—Certified Copy of Contract, Dated February 17, 1910, Be- tween W. H. Borden and N. D. Mac- Cauley and C. W. Palmer.....	298
Plaintiff's Exhibit "V"—Photograph....	304
Defendant's Exhibit No. 1—Letter, Dated March 1, 1910, W. H. Borden to Arctic Lumber Co.....	61, 305
Defendant's Exhibit No. 2—Contract Be- tween Macaulay and Palmer and Charles Goodall	97, 305

Index.	Page
EXHIBITS—Continued:	
Defendant's Exhibit 3—Bill, Dated April 21, 1910, of Arctic Lumber Co. to N. McCauley.....	307
Defendant's Exhibit No. 4—Bill, Dated April 30, 1910, Arctic Lumber Co. to N. McCauley.....	308
Defendant's Exhibit No. 5—Bill, Dated April 21, 1910, Arctic Lumber Co. to N. McCauley.....	309
Defendant's Exhibit No. 6—Bill, Dated April 25, 1910, Arctic Lumber Co. to N. McCauley.....	309
Defendant's Exhibit No. 7—Bill, Dated April 25, 1910, Arctic Lumber Co. to N. McCauley.....	310
Defendant's Exhibit No. 8, Bill, Dated April 26, 1910, Arctic Lumber Co. to N. McCauley.....	310
Defendant's Exhibit No. 9—Bill, Dated May 20, 1910, Arctic Lumber Co. to N. McCauley.....	311
Defendant's Exhibit No. 10—Bill, Dated May 30, 1910, Arctic Lumber Co. to N. McCauley.....	311
Defendant's Exhibit No. 11—Bill, Dated June 1, 1910, Arctic Lumber Co. to N. McCauley.....	312
Defendant's Exhibit No. 12—Bill, Dated June 2, 1910, Arctic Lumber Co. to N. McCauley.....	312

Index.	Page
EXHIBITS—Continued:	
Defendant's Exhibit No. 13—Bill, Dated June 2, 1910, Arctic Lumber Co. to N. McCauley.....	313
Defendant's Exhibit No. 14—Bill, Dated June 10, 1910, Arctic Lumber Co. to N. McCauley.....	314
Defendant's Exhibit No. 15—Bill, Dated June 3, 1910, Arctic Lumber Co. to N. McCauley.....	314
Defendant's Exhibit No. 16—Bill, Dated June 4, 1910, Arctic Lumber Co. to N. McCauley.....	315
Defendant's Exhibit No. 17—Bill, Dated July 8, 1910, Arctic Lumber Co. to N. McCauley.....	316
Defendant's Exhibit No. 18—Bill, Dated August 6, 1910, Arctic Lumber Co. to N. McCauley.....	316
Defendant's Exhibit No. 19—Photograph..	317
Defendant's Exhibit No. 20—Ground Lease, Dated February 17, 1910, Between W. H. Borden and N. D. Macaulay and C. W. Palmer.....	318
Defendant's Exhibit No. 21—Notice Re Me- chanics' Liens.....	323
Defendant's Exhibit No. 22—Letter, Dated March 1, 1910, W. H. Borden to Arctic Lumber Co., and Registry Receipt No.	

Index.	Page
3928, and Letter, Dated March 5, 1910, Arctic Lumber Co. to W. H. Borden.	190, 324
Findings of Fact and Conclusions of Law.....	218
Judgment by Default Against Norman Mc- Cauley.....	20
Judgment by Default Against C. W. Palmer...	19
Letter, Dated March 5, 1910, Arctic Lumber Co. to W. H. Borden.....	190
Minutes of Court, May 28, 1912—Trial Contin- ued.....	110
Minutes of Court, May 29, 1912—Trial Contin- ued.....	208
Motion of Defendant W. H. Borden for Non- suit.....	94
Motion for a New Trial.....	247
Names and Addresses of Attorneys of Record..	1
Opinion.....	209
Order Denying Motion for Nonsuit etc.....	95
Order Denying Motion for New Trial.....	248
Order Directing Transmission of Original Ex- hibits to Circuit Court of Appeals.....	277
Order Enlarging Time to File Record and Docket Cause.....	280
Order Overruling Demurrers.....	11
Order Re Preparation of Findings of Fact, Con- clusions of Law and Decree.....	208
Order Re Transcript on Appeal.....	216
Order Settling and Certifying Bill of Excep- tions and Record and for the Transmission of Certain Original Exhibits.....	276

Index.	Page
Petition for Appeal and Order Allowing Appeal.....	249
Plaintiff's Exceptions to Refusal of Court to Make Findings and Conclusions Offered by Plaintiff	242
Plaintiff's Objections to Defendant's Offered Findings and Conclusions.....	224
Plaintiff's Proposed Findings of Fact and Conclusions of Law.....	226
Praecipe for Transcript	281
Proceedings Re Settlement of Bill of Exceptions, etc	215
Recital Re Trial	21
Reply	17
TESTIMONY ON BEHALF OF PLAINTIFF:	
FELDMAN, H. C.	87
GILBERT, GEORGE K.....	113
Cross-examination	115
GRAY, JOHN E.	92
Cross-examination	94
LATHROP, AUSTIN E.	90
STEWART, R. R.	23
Cross-examination	57
TESTIMONY ON BEHALF OF DEFENDANTS:	
BORDEN, W. H.	176
Cross-examination	195
COURTRIGHT, ABRAHAM	164

Index.	Page
TESTIMONY ON BEHALF OF DEFEND- ANTS.—Continued:	
GOODALL, CHARLES J.....	95
Recalled	117
Cross-examination	119
HARRIS, W. B.	162
JOHNSON, JOHN	170
SIMPSON, P. L.	168
SLATER, H. A.	174

*In the District Court for the Territory of Alaska,
Third Division.*

C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff and Appellant,

vs.

W. H. BORDEN,

Defendant and Appellee.

Names and Addresses of Attorneys of Record.

R. J. BORYER, Cordova, Alaska.

KERR & McCORD, Seattle, Washington, Mutual
Life Building,

Attorneys for Plaintiff and Appellant.

BROWN & LYONS and E. E. RITCHIE, Valdez,
Alaska,

Attorneys for Defendant and Appellee. [1*]

*In the United States District Court for the District
of Alaska, Third Division.*

C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEORGE K. GILBERT and
CHARLES GOODALL,

Defendants.

*Page-number appearing at foot of page of original certified Record.

Complaint.**ACTION TO FORECLOSE LIEN FOR MATERIALS FURNISHED.**

Comes now the plaintiff, and for cause of action alleges:

I.

That the plaintiff is a corporation duly and regularly organized and existing under the laws of the State of Washington, and has complied with all of the laws in the District of Alaska, pertaining to foreign corporations doing business in Alaska, and is entitled to do business in Alaska.

II.

That on the 17th day of February, A. D. 1910, W. H. Borden of Cordova, Alaska, the owner of lot 21, block 2 of the town of Cordova, Alaska, entered into a lease whereby he leased to Norman McCauley and C. W. Palmer, lot twenty-one (21) of block two (2) of the town of Cordova, Alaska, according to the plat of said town, as recorded in Vol. 1 of Plats, page 10, of Cordova Recording Precinct, which lease provided that Norman McCauley and C. W. Palmer were to construct and erect a building on the aforesaid lot, and which building is to revert to W. H. Borden, according to the terms of said lease.

III.

That on or about the 23d day of February, [2] A. D. 1910, the defendant Norman McCauley made and entered into an agreement with the plaintiff, wherein and whereby the defendant, Norman McCauley, purchased from the Arctic Lumber Com-

pany lumber and other building material, for which he agreed to pay the plaintiff three thousand four hundred eighty dollars and thirty-six cents (\$3,480.36), which lumber and building material was purchased for and was used in the erection and construction of that certain building erected and constructed on lot 21, of block 2 of the town of Cordova, Alaska, according to the plat of said town, as recorded in Vol. 1 of Plats, page 10, of Cordova Recording Precinct, and as per the terms of said lease; that no part of this amount has been paid except one thousand two hundred forty-three dollars and seventy-nine cents (\$1,243.79), leaving a balance due the plaintiff of two thousand two hundred thirty-six dollars and fifty-seven cents (\$2,236.57), which amount is now due and unpaid; that the plaintiff commenced to deliver the aforesaid lumber and building material to the aforesaid house and lot on the 23d day of February, A. D. 1910, and continued to furnish the aforesaid lumber and building material up to and including the 6th day of August, A. D. 1910.

IV.

That the whole of the land above described upon which said building was constructed is required for the convenient use and occupation of said building, and all of said lumber and building material was furnished for said building.

V.

That on the 6th day of September, A. D. 1910, within and less than 30 days from the completion of said building, the plaintiff for the purpose of secur-

ing and perfecting a lien for the money so due it, as aforesaid, under aforesaid agreement with Norman McCauley, upon [3] the building and lands hereinbefore described, under provisions of the code of Alaska, filed for record in the office of the Recorder of Cordova Recording Precinct, its claim thereof duly verified by it, a copy of which is hereto attached, marked Exhibit "A" and made a part of this complaint, which claim was thereafter, on the same day, duly recorded in said office in a book kept therein for that purpose, to wit: Book 1 of Liens, at page 488.

VI.

That W. H. Borden is the owner of the aforesaid lot; that the defendants, Norman McCauley and C. W. Palmer, have a leasehold interest in and to the aforesaid lot; that each and all of the other defendants herein, namely, George K. Gilbert and Charles Goodall, claim some interest in and to the aforesaid property, but that the claim of each and all of the aforesaid defendants is inferior to and subsequent claims and liens to this plaintiff's lien. That six months have not passed since the filing of this lien and the institution of this suit.

VII.

That the plaintiff paid for verifying and recording said lien the sum of three dollars and sixty-five cents (\$3.65), and the further sum of twenty-five dollars as an attorney fee for drawing said lien.

VIII.

That three hundred dollars (\$300.00) is a reasonable attorney fee to be allowed the plaintiff in this action.

WHEREFORE, the plaintiff prays judgment against the defendants for the sum remaining unpaid for said materials and for cost of suit, including three dollars and sixty-five cents (\$3.65) paid for verifying and recording said lien, and three hundred dollars (\$300.00) as an attorney's fee herein; that the sum of twenty-five [4] dollars (\$25.00) and costs herein be adjudged a lien upon the lands and premises and building hereinbefore described and mentioned, and that said land and premises may be sold under the order and decree of this Court, and the proceeds thereof be applied to the payment of the costs of this suit, and the sum so found due to the plaintiff, and that it have execution for any deficiency, and for such other and further and proper relief as this Court deems just and equitable.

R. J. BORYER,

Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 28, 1911. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [5]

[Exhibit "A" to Complaint—Notice of Claim of Lien.]

C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Claimant,

vs.

N. McCAULEY and W. H. BORDEN.

Notice is hereby given, that on the 23rd day of February, A. D. 1910, the *Artic* Lumber Company, a corporation, duly organized under the laws of the

state of Washington and authorized to do business in Alaska, commenced and did furnish lumber and building material to be used and which was used in the construction and erection of that certain building upon the following described real estate; lot 21, of Block 2 of the Town of Cordova, Alaska, according to the plat of said town, as recorded in Vol. 1, plats, page ten of Cordova Recording Precinct, the furnishing of which lumber and building material ceased or stopped on the 6th day of August A. D. 1910.

That the aforementioned lumber and material was furnished to N. McCauley the lessee of aforementioned lot with the consent and knowledge of W. H. Borden, who is the owner of said lot; that N. McCauley was at the time of furnishing said lumber and building material, the lessee of said lot and is now the lessee of said lot, and W. H. Borden was at the time of furnishing the aforementioned lumber and building material the owner of said lot. That thirty days has not elapsed since claimant ceased or stopped furnishing said materials. That the value of materials furnished is the sum of \$3480.36, and after deducting all credits and offsets there is due and owing this claimant, the sum of [6] \$2236.57, for which last named sum the Arctic Lumber claims a lien upon the building and lot and real estate above described said last named sum being a true statement of claimants demand.

Dated this 5th day of Sept. A. D. 1910.

ARCTIC LUMBER COMPANY,

By R. R. STEWART, Sect.

United States of America,
District of Alaska,—ss.

R. R. Stewart, being first duly sworn, upon his oath deposes: That he is the secretary and manager of the Arctic Lumber Company, the claimant above named; that he has read the foregoing claim and knows the contents thereof, and has knowledge of the facts therein stated and that same are true and that he makes this verification for and on behalf of the plaintiff.

R. R. STEWART.

Subscribed and sworn to before me this 5th day of September, A. D. 1910.

[Seal]

R. G. BORYER,

Notary Public in and for the District of Alaska,
Residing at Cordova.

Filed for record at 5 o'clock P. M. Sept. 6, 1910.

O. A. TUCKER,

U. S. Commissioner and ex-officio Recorder.

United States of America,
District of Alaska,—ss.

This is to certify that the foregoing (two sheets) is a true, full and correct copy of that certain written instrument or lien filed and recorded in the office of the Commissioner and ex-officio Recorder of Cordova Precinct, District of Alaska, and now of record therein, on page 488 of Vol. 1 of Liens. [7]

(Signed) O. A. TUCKER,

Commissioner and ex-officio Recorder.

IN WITNESS WHEREOF, I have
hereunto set my hand and official seal this [Seal]
27th day of February, A. D. 1911.

United States of America,
District of Alaska,—ss.

I, R. R. Stewart, being first duly sworn, deposes
and says: That I am the Secretary and Manager of
the Arctic Lumber Co., plaintiff named in the above-
entitled action, and that the foregoing Complaint is
true as I verily believe.

R. R. STEWART.

Subscribed and sworn to before me this 28th day
of Feb., A. D. 1911.

[Seal] ED M. LAKIN,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory
of Alaska, Third Division. Feb. 28, 1911. Ed M.
Lakin, Clerk. By V. A. Paine, Deputy. [8]

*In the District Court for the District of Alaska,
Third Division.*

C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEORGE K. GILBERT and
CHARLES GOODALL,
Defendants.

Demurrer [of W. H. Borden to Complaint].

Comes now the defendant, W. H. Borden, and for himself alone, demurs to the plaintiff's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

BROWN & LYONS,
Attorneys for Defendant, W. H. Borden.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 24, 1911. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [9]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEORGE K. GILBERT and
CHARLES GOODALL,
Defendants.

Demurrer [of George K. Gilbert to Complaint].

Comes now defendant, George K. Gilbert, and appearing for himself alone demurs to plaintiff's complaint, and for cause of demurrer alleges:

First: That it appears upon the face of said complaint that the same does not state facts sufficient

to constitute a cause of action in favor of plaintiff and against this defendant.

OSTRANDER & DONOHUE,

Attorneys for Defendant George K. Gilbert.

United States of America,

District of Alaska,—ss.

T. J. Donohoe, being first duly sworn, deposes and says that he is one of the attorneys for the above-named defendant. That on the 25th day of March, 1911, he served the above and foregoing demurrer upon R. J. Boryer, the attorney of record for plaintiff, by depositing in the U. S. postoffice at Valdez, Alaska, a true and correct copy of the foregoing demurrer, enclosed in an envelope addressed to R. J. Boryer, at Cordova, Alaska, and prepaid the postage thereon. That there is a regular service of U. S. mail between Valdez, Alaska, and [10] Cordova, Alaska; that there is a U. S. postoffice at Cordova, Alaska; that the residence of and the postoffice address of said R. J. Boryer is at Cordova, Alaska.

T. J. DONOHUE.

Subscribed and sworn to before me this 25th day of March, 1911.

J. H. MURRAY,

Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 25, 1911. Ed. M. Lakin. By V. A. Paine, Deputy. [11]

CORDOVA JOURNAL NO. 1, PAGE 170.

C. 11.

ARCTIC LUMBER CO.,

vs.

W. H. BORDEN, GEO. GILBERT et al.

Order Overruling Demurrers.

Now, on this day, this cause coming on to be heard upon the demurrer of the defendants to the amended complaint as amended by interlineation in open court of the plaintiff herein, R. J. Boryer appearing for the plaintiff; C. M. Frazier, E. E. Ritchie, Brown & Lyons appearing for defendant, W. H. Borden. Ostrander & Donohoe appearing for defendant Geo. Gilbert, and after arguments had and the Court being fully advised in the premises, overrules said demurrer and the defendants are allowed thirty days in which to further plead.

November 13th, 1911—1st Court Day—Cordova, Alaska. [12]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEORGE K. GILBERT and
CHARLES GOODALL,
Defendants.

Answer of W. H. Borden.

Defendant, W. H. Borden, answering plaintiff's complaint separately for himself, says:

I.

Answering the first paragraph of plaintiff's complaint he denies the same on information and belief.

II.

Defendant admits the allegations of paragraph II of said complaint.

III.

Answering paragraph III of said complaint, defendant says he has no knowledge sufficient to enable him to deny or admit the allegations that plaintiff furnished to the defendant, Norman McCauley, lumber and other building material to the value of \$3,480.56, for which said McCauley agreed to pay said sum, the said lumber and other building material to be used in the construction of a building, or any certain building erected on the land described in plaintiff's complaint, and that there is now a balance due for said lumber and building material of \$2,236.57 according to the alleged agreement between plaintiff and defendant, Norman [13] McCauley, and therefore, on information and belief denies said allegations, and denies that any sum whatever is now due to plaintiff on account of said alleged purchase and sale and delivery of lumber and other building material as set forth in its complaint. This defendant further denies that plaintiff delivered or continued to deliver lumber and or other building material pursuant to said alleged agree-

ment with defendant, Norman McCauley, for use in the construction of said house or building up to and including the 6th day of August, 1910; denies that any lumber or other building material was furnished for the construction of said building on said 6th day of August, 1910, or at any time after the —— day of April, 1910, by plaintiff or anyone for plaintiff.

IV.

Defendant neither admits nor denies the allegations of paragraph IV of said complaint.

V.

Defendant admits that on the 6th day of September, 1910, plaintiff filed in the office of the recorder of Cordova Precinct a purported claim of lien as set forth in paragraph V of its complaint and in Exhibit "A," attached thereto, but denies that the same was filed within and less than thirty days from the completion of said building; but alleges that, on the contrary, said building was fully completed and occupied on or about the —— day of April, 1910, and no lumber or other building material was thereafter furnished by plaintiff to be used in the construction of the same, and no lumber or other material attempted to be furnished and delivered upon the premises by plaintiff for the purported purpose of being used in the construction of said building was ever used in constructing said building or contracted to be delivered for that purpose, by any of the defendants herein, after said —— day of April, 1910. This defendant further says that seven days after the execution and delivery of the lease from himself to [14] defendants McCauley and Palmer, de-

scribed in plaintiff's complaint, to wit, on the 24th day of February, 1910, and one day after the date, February 23, 1910, alleged by plaintiff as the date when it entered into the alleged agreement with defendant Norman McCauley to sell and furnish to him lumber and other building material to be used in the construction of said building this defendant caused a notice in writing to be posted in a conspicuous place upon the foundation of the building thereafter erected upon said lot by defendants, McCauley and Palmer, which said notice informed all persons that this defendant, W. H. Borden, owner of said lot and of said foundation, and reversioner of the building to be erected thereon, would not be responsible for any construction, alteration, or repair had or done on said lot or structure, or for any material or work or labor thereon or therefor. A copy of said notice is attached hereto, marked Exhibit "A" and made a part of this answer. This defendant further alleges that long before the institution of this suit, to wit, on or about the 1st day of October, 1910, the defendants Norman McCauley and C. W. Palmer lessees of said lot under the lease mentioned in paragraph 11 of plaintiff's complaint, forfeited all their rights in and to said lot and improvements thereon under the terms of said lease by failure to keep the covenants entered into by them in accepting said lease, and forfeiture of said lease and of all rights thereunder was thereupon declared by said lessor, this defendant, as provided by the terms of said lease, and he thereupon proceeded to re-enter upon said premises and to retake possession of the same; and all rights and

demands of persons claiming by, through or under said lessees, in or to said premises, or the buildings or improvements thereon, became and were declared forfeited at the same time and with the forfeiture of said lease. [15]

VI.

Defendant denies that the defendants Norman McCauley and C. W. Palmer have a leasehold interest in and to the aforesaid lot, and denies that they had any interest therein at the date of the institution of this suit, or have had at any time since the suit was filed; denies that the defendants, George K. Gilbert and Charles Goodall have any interest in said lot or building thereon.

VII.

Defendant denies on information and belief that plaintiff paid \$3.65 for verifying and recording said claim of lien, and that it paid the further sum of \$25 as an attorney fee for drawing said lien.

VIII.

Defendant denies that \$300 is a reasonable attorney fee to be allowed to plaintiff in this action, and denies that plaintiff is entitled to be allowed any attorney fee whatever.

WHEREFORE defendant prays that this action be dismissed at the cost of plaintiff, and that a decree be entered herein by the Court that plaintiff's claim is invalid and wholly without foundation in law or equity, and that the same is not a lien upon

the premises described in the complaint or any part thereof, or any interest therein.

BROWN & LYONS and
E. E. RITCHIE,

Attorneys for Defendant, W. H. Borden. [16]

**Exhibit "A" [to Answer of W. H. Borden—Notice
Re Mechanics' Liens].**

I, W. H. Borden, the owner of the lot upon which this foundation structure stands, being lot No. 21, in Block No. 2 of the Town of Cordova, Alaska, and the owner of this foundation structure thereon and the owner of an interest in the building and improvements to be placed thereon, to wit: the entire ownership of said building and improvements from and after the termination of a certain lease dated February 17th, 1910, and running not longer than April 1st, 1915, subject to all the terms of said lease,

HEREBY GIVE NOTICE that I will not be responsible for any construction, alteration or repair had or done on said lot, or structure, or for any material or work or labor thereon or therefor.

Dated February 24th, 1910.

(Signed) W. H. BORDEN,
Owner of said Property and Interest.

United States of America,
Territory of Alaska,—ss.

W. H. Borden, being duly sworn, says that he is one of the defendants named in this action; that he has read the foregoing answer and he believes the same to be true.

W. H. BORDEN.

Sworn to and subscribed before me this 27th day of November, 1911.

[Seal]

S. P. CHAPIN,

Notary Public for District of Alaska.

My commission expires March 21st, 1915.

Copy received November 27, 1911.

Attorney for Plaintiff.

Copy received—R. J. BORYER. [17]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 27, 1911. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [18]

*In the District Court for the District of Alaska,
Third Division.*

C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEORGE K. GILBERT and
CHARLES GOODALL,

Defendants.

Reply.

Replying to paragraph V of defendants' answer, plaintiff denies that defendant caused a notice in writing to be posted in a conspicuous place upon the foundation of the building erected upon said lot by defendants, McCauley and Palmer, and denies that said notice informed this plaintiff as to the owner-

ship of said lot or of said foundation, and denies that said notice informed this plaintiff that defendant, W. H. Borden, would not be responsible for any construction, alteration or repair that plaintiff did on this said lot or structure, or for any material or work or labor thereon or therefor.

Denies that the said defendants, N. McCauley and C. W. Palmer, forfeited all their rights in and to the aforesaid lots and improvements, and denies that the said W. H. Borden forfeited, or had the right to forfeit the interest of N. McCauley and C. W. Palmer.

R. J. BORYER,

Attorney for Plaintiff. [19]

United States of America,
District of Alaska,—ss.

I, R. R. Stewart, being first duly sworn, deposes and says: That I am the Manager of the Arctic Lumber Company, a corporation, named in the above-entitled action, and that the foregoing Reply is true as I verily believe.

R. R. STEWART.

Subscribed and sworn to before me this the 6th day of Dec., A. D. 1909.

[Seal]

R. J. BORYER,

Notary Public for the District of Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 8, 1911. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [191½]

*In the District Court for the District of Alaska,
Third Division.*

C. No. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE K. GILBERT,
CHARLES GOODALL, NORMAN Mc-
CAULEY and C. W. PALMER,
Defendants.

Judgment by Default [Against C. W. Palmer].

The motion of the plaintiff herein having come on to be heard, and it appearing to the Court that C. W. Palmer has been regularly served with process and having failed to appear and answer or otherwise plead to the plaintiff's complaint on file herein, and the time allowed by law for answering or appearing having expired, a default of the defendant, C. W. Palmer, in this action is hereby ordered and decreed according to law.

Done this the 1st day of June, A. D. 1912, *nunc pro tunc* as of May 28th, 1912.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 1, 1912. Ed M. Lakin, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. C. 1, page No. 290.

*In the District Court for the District of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE K. GILBERT,
CHARLES GOODALL, NORMAN Mc-
CAULEY and C. W. PALMER,
Defendants.

Judgment by Default [Against Norman McCauley.

The motion of the plaintiff herein having come on to be heard and it appearing to the Court that Norman McCauley has been regularly served with process and having failed to appear and answer or otherwise plead to the plaintiff's complaint on file herein, and the time allowed by law for answering or appearing having expired, a default of the defendant, Norman McCauley, in this action is hereby ordered and decreed according to law.

Done this the 1st day of June, A. D. 1912, *nunc pro tunc* as of May 28th, 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 1, 1912. Ed M. Lakin, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. C. 1, page No. 291.

[20 $\frac{1}{2}$]

[Recital Re Trial.]

*In the District Court for the Territory of Alaska,
Third Division.*

C. 11.

ARCTIC LUMBER CO.,

Plaintiff,

vs.

W. H. BORDEN et al.,

Defendants,

Now on this day this cause coming on regularly for trial before the Court, R. J. Boryer, Esq., appearing for the plaintiff; E. E. Ritchie and John Lyons appearing for the defendant, W. H. Borden, and both sides hereto announcing their readiness for trial, the following proceedings were had, to wit:

WHEREUPON R. R. Stewart was sworn and testified in behalf of the plaintiff.

WHEREUPON the plaintiff offers in evidence and marked for identification Plaintiff's Exhibits "A" to "V," inclusive.

WHEREUPON plaintiff's Exhibits "A" to "V," inclusive, were admitted in evidence.

WHEREUPON the defendant offers in evidence and marked for identification Defendants' Exhibits 1 and 2.

WHEREUPON said exhibit were admitted in evidence as defendants' exhibits.

WHEREUPON H. C. Feldman, A. E. Lathrop and John E. Barry were sworn and testified in behalf of the plaintiff.

WHEREUPON the plaintiff having submitted testimony in support of its cause of action and rested and the defendant at the close of the plaintiff's cause having moved the Court for a judgment of nonsuit against the plaintiff, and the matter having been argued by counsel, and the Court, being fully advised in the premises, denies said motion.

WHEREUPON Chas. Goodall was sworn and testified as a witness on behalf of the defendant. [21]

WHEREUPON it being the hour of adjournment, and the testimony of the witness Goodall being incomplete, the further trial of this cause is continued until to-morrow, at the hour of 10 o'clock A. M.

The above is a copy of the trial minutes found at page 284, Journal C. 1, under date of May 27th, 1912.
[22]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE K. GILBERT,
CHARLES GOODALL, NORMAN Mc-
CAULEY and C. W. PALMER,
Defendants,

Bill of Exceptions and Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard on

Monday, the 27th day of May, 1912, before the Honorable EDWARD E. CUSHMAN, Judge of said court.

The plaintiff herein being represented by its attorney and counsel, R. J. Boryer, Esq.

The defendant Borden appearing by his attorney and counsel, John Lyons, Esq., and E. E. Ritchie, Esq.

Opening statements were made to the Court on behalf of the plaintiff by Mr. Boryer and on behalf of the defendant Borden by Judge Lyons.

WHEREUPON the following additional proceedings were had and done, to wit: [23]

[Testimony of R. R. Stewart, for Plaintiff.]

R. R. STEWART, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. What is your full name?

A. Ralph R. Stewart.

Q. Where do you reside? A. Cordova.

Q. What is your position with the Arctic Lumber Company?

A. I am secretary and manager of the Arctic Lumber Company.

Q. Is the Arctic Lumber Company a foreign corporation? A. Yes, sir.

Q. A corporation organized under the laws of Washington? A. Yes, sir.

Q. And has complied with the statute regarding the filing of articles of incorporation in Alaska?

(Testimony of R. R. Stewart.)

A. Yes, sir.

Mr. RITCHIE.—We admit that.

Q. I will ask you if you are acquainted with Norman McCauley. A. Yes, sir.

Q. I will ask you what, if any, arrangements you had with McCauley for the furnishing of any lumber and building material. What was the substance of your arrangement with him for the furnishing of the material for the construction of the house erected on the lot and block as mentioned in this complaint?

A. Yes, sir. Mr. McCauley came to us and got our terms and price on lumber and told us what he was going to build,—about what he was going to build, the size of the building, and made arrangements for the delivery of the lumber for the building.
[24*—2†]

Q. You gave him a price on the lumber, different lumber for the construction of the building.

A. That class of lumber; yes, sir.

Q. And that price was agreed upon?

A. Yes, sir.

Q. That price is the same price as charged for the lumber in these bills? A. Yes, sir.

Q. Did he at that time state or designate to you what kind of a house he was going to build and what he wished this lumber for? A. He did.

Q. Will you state just what that was?

*Page-number appearing at foot of page of Certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions and Transcript of Evidence, as same appears in Certified Transcript of Record.

(Testimony of R. R. Stewart.)

A. He said he was going to build a two-story house with a basement and in a general way designated what it was for,—to be a rooming-house upstairs and to be plastered and lighted and wired for electric lights and telephone, wash basins and hot and cold water and contain a steam heating plant with radiators and pipes.

Mr. RITCHIE.—We move to strike out all the testimony of the witness in regard to the electric lighting and steam heating plants, etc., for the reason that it is not shown that it was any part of his contract for furnishing material.

Objection overruled. Defendant allowed an exception.

Q. Did he at that time tell you how he was going to finish this building?

Mr. RITCHIE.—We object for the same reason. Objection overruled. Defendant allowed an exception.

A. He told me in a general way how he was going to finish it, yes; we talked over the different classes of material he would need and he enumerated the different kinds and it was [25—3] necessary to know how he was going to finish it in order to know the different kinds of material that would go into it and get the prices on it.

Q. Did he or did he not tell you that this house was to have a finished basement? A. Yes, sir.

Q. Did he or did he not tell you that this house was to have and that he was going to put in a steam-heating plant?

(Testimony of R. R. Stewart.)

Mr. RITCHIE.—For the purpose of saving time, we object again, with the understanding that it is a standing objection to Mr. Stewart testifying to anything connected with this building excepting the material he was to furnish.

Objection overruled. Defendant allowed an exception to this and all similar questions.

A. Yes, sir; he mentioned that it was to have a steam-heating plant.

Q. I will ask you now if a steam-heating plant has ever been put into that building.

A. Not to my knowledge.

Q. Have you examined the property? A. Yes.

Q. Do you or do you not know whether a steam-heating plant has been put in there?

A. I know it has not.

Q. Do you know whether the radiators or piping for a steam-heating plant has ever been put into the building? A. No, sir, they have not.

Q. Do you know if the basement has been finished according to his description, that he told you at the time he purchased this lumber? [26—4]

A. No, sir.

Q. Do you know if this particular house has been left unfinished in any other particulars?

A. Yes, sir.

Q. In what?

A. In one particular it was; the face or siding towards B. St. that he contracted to purchase cedar siding to put on it, it is just finished with a shiplap siding and he knew he would have to put cedar sid-

(Testimony of R. R. Stewart.)

ing on it because he knew the shiplap wouldn't keep the weather out. He arranged to purchase cedar siding for the side, checked over various kinds of siding and concluded to put on cedar siding and it has never been put on.

Q. Until this time?

A. No cedar siding; later they had to put on something and they put on rafting, some sort of rafting.

Q. Do you remember when that was put on?

A. Some time later, considerably after we filed the lien—I don't remember the date of it.

Q. After you filed the lien? A. Yes, sir.

Q. Do you know who put that on?

A. I think Mr. Borden put that on. Mr. Goodall did the work—I think it was for Mr. Borden.

Mr. BORYER.—Counsel has stated, I believe, that they do not care to contest or put us to the proof of some of these bills, that is, from February down to a certain time. If counsel will indicate the time, we will only put our proof in as to the lumber that was furnished subsequent to that.

Mr. RITCHIE.—We will admit that everything up to and including [27—5] the 13th of April, receipted for by Mr. Goodall, was delivered.

Mr. BORYER.—Do I understand all you desire on the bills up to April 13th is the proof that they were received by Mr. Goodall?

Mr. RITCHIE.—Yes, that they were delivered to Mr. Goodall or Mr. McCauley on the ground. If you have Mr. Goodall's receipt, that is sufficient, but any-

(Testimony of R. R. Stewart.)

thing you have not his receipt for, we would like other proof.

Q. I will ask you, then, Mr. Stewart, to look over your bills beginning February 23d up to and including April 13th, and see if all those bills are signed by Mr. Goodall, all the bills between those dates.

A. There is one of March 7th,—the whole bill is not signed by Mr. Goodall, for the reason that part of it is material that went directly from our place to Mr. Meehan's shop, across the street and he used the material in making something in the shop. The balance of it is signed by Charles Goodall—it is stuff Mr. Meehan worked up before going to the job.

Mr. BORYER.—Is that satisfactory?

Mr. RITCHIE.—Yes—how much is that?

A. In this bill of March 7th amounting to \$75.35 all the items except three-quarters of a thousand shingles, one piece 2x14—16 S4S Clear; 1 piece 2x16—16; 2 pieces 4x4—16; and one piece 3x6—18. The shingles, one of their carpenters, I can't make out his name, signed for them and the other went to Mr. Meehan's shop. It is on the invoice of March 7th; it is all signed by Goodall except that last portion and the shingles and the delivery slips there include [28—6] everything except the last portion marked there that went to Mr. Meehan's shop.

Q. Take out all that is signed by Mr. Goodall up to the 13th of April.

A. There is an item of 15 cts. for three brick—probably somebody came down to the office and got it—it is not signed by Mr. Goodall.

(Testimony of R. R. Stewart.)

Mr. BORYER.—Leave that out.

WITNESS—(Continuing.) Here is one—I don't know whether that is Mr. Goodall's signature or not,—whether it is his initial or not—H. W. G.; here is one signed H. W. G.; here is one signed by Norman McCauley.

Mr. RITCHIE.—That amounts to the same thing. If those items are all small, we don't care anything about them.

The WITNESS.—Here is one Palmer signed. The signature on this is one of the carpenters,—I can't state the name. These are various small items for which we have no delivery receipts here, some of them—they were carried around in the pocket and worn out, and some of them were called for at the office.

Q. What bills are they—what is the amount of them and the date? A. One of April 13th, \$6.08.

Q. Do you know whether that was delivered?

A. Yes, I know they were all delivered.

Mr. RITCHIE.—Of your own knowledge?

A. Yes, sir, of my own knowledge. They were delivered to the Alaska Transfer Co. or the people that came for them in each and every case.

Q. They were delivered to the Alaska Transfer Co. [29—7] A. Yes, sir.

Q. For whom was the Alaska Transfer Company hauling? A. For McCauley & Palmer.

Q. Did they secure this lumber for them?

A. Yes.

Q. By whom was it ordered?

(Testimony of R. R. Stewart.)

A. Most of it was ordered by Mr. Goodall.

By the COURT.—In order to make this evidence intelligible, those bills will have to be identified in some way.

Mr. BORYER.—My object was to get them to admit all of the bills that were delivered between March 12th and April 13th except such bills as were not signed by Mr. Goodall or Palmer or McCauley—I want to segregate those bills and take out the ones that were not signed by them and then prove those bills, as the others would be admitted.

Q. Are all those bills signed by either Palmer, McCauley or Goodall?

A. This is the bunch that are not (handing to Mr. Boryer).

Mr. BORYER.—I presume we will have to check up the bills that are signed by Palmer & McCauley or Goodall in order to get the amounts of those bills.

Q. Take these bills and tell me what the numbers are—those that are signed by either Goodall or McCauley or Palmer.

A. I can read these here and you can check them.
February 25th, \$172.62; February 24th, \$155.25;
February 26th, \$102.81; February 28th, \$133.71;
February 27th, \$197.79; February 28th, \$213.96;
March first, \$142.24; March 2d, \$171.66; March 3d,
\$194.04; March 4th, \$47.94; March 5th, \$108.75;
March 7th, \$222.15; March 10th, \$40.77; March 13th,
\$12.73; March 14th, \$116.61; March 17th, \$36.18;
March 18th, [30—8] \$21.63; March 20th, \$152.00;
March 18th, \$10.20; March 22d, \$36.07; March 23d,

(Testimony of R. R. Stewart.)

\$21.88; March 25th, \$9.19; March 26th, \$79.76; March 24th, \$42.49; March 28th, \$128.00; March 29th, \$38.23; March 29th, \$6.50; March 30th, \$49.95; April 6th, \$110.34; March 19th, \$43.21; April 7th, \$16.00; April 11th, \$22.60; April 4th, \$7.02; March 9th, \$187.08. There are two small ones here—the delivery receipts are in connection with another one—March 8th, \$3.75 and one of March 5th, \$30, the delivery sheet is detached from it.

Mr. BORYER.—Counsel acknowledges the indebtedness of \$30 on March 5, 1910.

Judge LYONS.—We acknowledge that the stuff was delivered to the teamster—we don't acknowledge any indebtedness on the lien of course.

Q. For whom was this lumber furnished on March 5th, amounting to \$30—material consisting of 500 brick and one barrel of lime—to whom did you sell that? A. To Palmer & McCauley.

Q. To whom did you deliver it?

A. Delivered it to the Alaska Transfer Co.

Q. Who is the Alaska Transfer Co.?

A. Captain Lathrop is manager.

Q. For whom were they hauling?

A. They were hauling this for McCauley & Palmer.

Q. It was delivered to them to deliver to McCauley & Palmer? A. Yes, sir.

Q. They were acting for Palmer & McCauley, were they, in the delivery? A. Yes, sir.

Q. Did you or did you not on the 23d day of February, 1910, furnish material to the amount of

(Testimony of R. R. Stewart.)

\$32.01? [31—9] A. We did.

Q. Where is your bill for that?

A. That bill is signed by Goodall, \$32.01, February 23d.

Q. What is that other bill?

A. This is a credit for lumber returned—it shows on the credit sheet.

(A paper is marked for identification Plaintiff's Exhibit "A.")

Q. I hand you a paper marked Plaintiff's Exhibit "A" and ask you what that paper is.

A. This is a duplicate of the original invoice for material furnished McCauley on March 7, 1910. The amount is \$75.35.

Q. It is marked here March 8th?

A. I guess it is.

Q. To whom did you deliver that lumber?

A. Except the last five items on the bill they were delivered to the Alaska Transfer Co. for delivery to McCauley & Palmer.

Q. By whom were the Alaska Transfer Co. sent after this lumber? A. McCauley & Palmer.

Q. In regard to the last five items—explain them.

A. There is one item of three-quarters of a thousand shingles.

Q. To whom was that furnished?

A. In all probability that was furnished to the Alaska Transfer Co. too—we haven't the delivery sheet for it here.

Q. Did that go into the building we have reference to, furnished for that?

(Testimony of R. R. Stewart.)

A. Yes, sir, that was used for wedging in the construction; the last four items on the bill were delivered to Mr. Meehan who runs a planing-mill and shop across the street from the office. [32—10]

Q. Under whose instructions were they delivered to him?

A. I think Mr. Goodall, if I am not mistaken.

Q. For whom was Mr. Goodall working?

A. For McCauley & Palmer.

Q. For what purpose were they delivered to Mr. Meehan?

A. I judge they were to be made into a bar or counter.

Q. To be used in the building?

A. Yes, sir, a counter or bar, I should judge, from the stuff.

Q. The amount of that bill is how much?

A. \$75.35.

Q. Now, will you explain to the Court your system of keeping books and just exactly what part of your bookkeeping system that paper takes the place of?

A. We have a duplicating or rather a triplicating delivery book and all charges of items that go out are made in this triplicating book. We have no teams of our own and the freighting is all done by the parties buying the lumber and we give the driver two delivery receipts,—make him sign our delivery receipt at the office and then two delivery receipts, one we give to the customer and the other that is signed by the customer we retain in the office and from that delivery receipt, we make our invoice on

(Testimony of R. R. Stewart.)

the typewriter in duplicate—the original goes to the party buying the material and the duplicate is filed and this is one of the duplicates and it is filed in our regular files and becomes our book of record, our day-book or journal, as you might call it, and we post directly from this to the ledger and retain this for the entry.

Q. Then that is your book of original entry?

A. Yes,—it is afterwards bound in book form.

[33—11]

(The paper marked Plaintiff's Exhibit "A" for identification is admitted in evidence as Plaintiff's Exhibit "A.")

(Another paper is marked Plaintiff's Exhibit "B" for identification.)

Q. I hand you Plaintiff's Exhibit "B" and ask you to state what that is—first give the date.

A. It is March 12th. This is the delivery receipt for a certain amount of lumber and material delivered on that date.

Q. To whom?

A. Delivered to the Alaska Transfer Co. for Norman McCauley.

Q. What is the amount?

A. The amount of it is \$46.19.

Q. That was delivered to Palmer & McCauley, was it? A. Yes, by the Alaska Transfer Co.

(The paper with slip attached is admitted in evidence as Plaintiff's Exhibit "B.")

(Another paper is marked for identification Plaintiff's Exhibit "C.")

(Testimony of R. R. Stewart.)

Q. I hand you Plaintiff's Exhibit "C" and ask you what that is?

A. That is a duplicate of the invoice of our record of stuff delivered to McCauley on March 15th to the amount of \$4.80.

Q. Was that delivered to McCauley & Palmer for this particular building?

A. It was delivered to the Alaska Transfer Co. for them.

(It is admitted as Plaintiff's Exhibit "C.")

Q. On the 21st of March there is a charge of \$68.99 for which Mr. Goodall has signed for \$63.55—the delivery of \$5.44 is not signed for. Can you explain that? It is number 297.

A. The \$63.55 is signed for by Mr. Goodall; this \$5.44 on the other slip is signed by H. W. G.

By the COURT.—Who is this H. W. G.? [34—12]

A. I don't know—Mr. Goodall probably knows.

Mr. RITCHIE.—It is H. W. Gleason, a carpenter who worked on the building.

Mr. BORYER.—Is he here now?

Mr. GOODALL.—No, sir.

Mr. RITCHIE.—I think we will admit that.

Judge LYONS.—We don't deny the amount of the lumber or the price of the lumber but we want them to prove that this lumber went into the building.

(Another paper is marked for identification Plaintiff's Exhibit "D.")

Q. I hand you Plaintiff's Exhibit "D" and ask you what that is.

A. It is a record of delivery March 27th of a half

(Testimony of R. R. Stewart.)

window—the amount is \$1.75.

Q. To whom was it delivered?

A. I couldn't say whether that was delivered to—probably a man called at the office for that.

Q. Whom was it sold to?

A. To Norman McCauley.

Q. Was it delivered to him or the party for this building?

A. I have every reason to believe it was.

Mr. RITCHIE.—We don't care to raise any point on that—we will admit it.

The WITNESS.—A good many of those things they would call for.

(Another paper is marked Plaintiff's Exhibit "D.")

Q. I hand you Plaintiff's Exhibit "D" and ask you what that is.

A. That is a record of the delivery of five doors March 31st amounting to \$15.

Q. To whom were they delivered?

A. Delivered to the Alaska Transfer Co. [35—13]

Q. For whom? A. For Norman McCauley.

Q. At whose request? A. McCauley's request.

Q. Do you know whether they were used in the building? A. Yes, sir.

Q. Are those the only doors? A. I think not.

(The paper is admitted in evidence as Plaintiff's Exhibit "D.")

Mr. BORYER.—Here is a bill for \$32. April first for plaster—do you care to admit that? It is signed

(Testimony of R. R. Stewart.)

by a man named Swanson.

Mr. RITCHIE.—Did Mr. Swanson work for you, Mr. Goodall?

Mr. GOODALL.—Yes, sir, that is all right.

Mr. RITCHIE.—We admit that.

Mr. BORYER.—Here is one April 2d, \$8.00.

Mr. RITCHIE.—We admit that.

Mr. BORYER.—April 13th, \$6.08.

Mr. RITCHIE.—We admit that.

Mr. BORYER.—April 9th, 55 cts.

Mr. RITCHIE.—We admit that—that is all right.

Mr. BORYER.—March 15th, \$3.29.

Mr. RITCHIE.—That is all right.

Q. March 8th—what is the amount of that bill?

A. The invoice is not with this—the amount of it is not on this; this is just the delivery receipt; possibly the invoice would be dated March 9th.

Mr. BORYER.—Here is one March 5th, \$30, and that checks up everything in March and in April to the 13th—

Q. Have you any bills there subsequent to April 13th, 1910? A. Yes, sir. [36—14]

Q. Do you have a bill there for April 21, 1910?

A. Yes, there is one for \$1.11, also one for \$46.17 for April 21st.

Q. What is the \$46.17 for?

A. That is material furnished, signed by Mr. Palmer for Palmer & McCauley.

Mr. BORYER.—Do you admit that?

Judge LYONS.—No, we admit nothing after the 14th of April. Our contention is the building was

(Testimony of R. R. Stewart.)

completed at that time and we shall object to anything delivered after that time unless they can show it was used in the construction of the building.

Mr. BORYER.—Do I understand that your objection runs to the fact that it did not go into the building or that it was not delivered?

Mr. RITCHIE.—Both. Under the Oregon decisions it is absolutely necessary that they should not only show that they delivered building material according to contract but that it actually went into the construction of the building itself—it is incumbent upon them to prove that that was done. Our contention will be that this building was completed on the 13th or 14th of April, that the building itself was completed. There was perhaps other work done around there such as moving inside fixtures for the saloon, but that was alterations and had nothing to do with the construction of the building. We maintain everything done after the 13th of April was either an alteration or something that had nothing to do with the construction, and they must prove that anything they furnished after that date went into the actual building itself. [37—15]

(Two papers (attached) are marked Plaintiff's Exhibit "E.")

Q. I hand you Plaintiff's Exhibit "E" and ask you what that is.

A. It is a delivery receipt and the record of the delivery and duplicate of the invoice, delivered April 21st, \$46.17, for lumber.

Q. Furnished to whom?

(Testimony of R. R. Stewart.)

A. Furnished to McCauley & Palmer.

Q. For what purpose, if you know?

A. It was some place in the construction of the building.

Q. In the construction of what building?

A. The McCauley & Palmer building.

Q. On the lot and block designated in the complaint? A. Yes, sir.

Q. Who signed for this? A. Mr. Palmer.

Q. Mr. Palmer, one of the defendants in the case?

A. Yes, sir.

Mr. RITCHIE.—We move to strike this out—unless they can show by some other person, by a mechanic or someone else, that that lumber actually went into the building, we object to it as incompetent and being no part of this case.

Mr. BORYER.—I offer it in evidence.

By the COURT.—It will be admitted subject to consideration when all the evidence is in.

(It is marked Plaintiff's Exhibit "E" and admitted in evidence.)

Q. Was that lumber contained in that bill ever returned to you? A. No, sir.

(Another paper is marked Plaintiff's Exhibit "F.")

Q. I hand you a paper marked Plaintiff's Exhibit "F." What is that? [38—16]

A. That is a record of material, April 21st, \$1.11 4 pieces of 2x4-14—for McCauley & Palmer.

Q. Delivered to McCauley & Palmer?

A. Delivered to the Alaska Transfer Co.

(Testimony of R. R. Stewart.)

Q. At whose request? A. McCauley's request.

Q. To be used where?

A. To be used in that building, the McCauley & Palmer building.

Q. On this particular lot? A. Yes, sir.

The exhibit is offered in evidence and admitted, subject to the same objection, for consideration when the evidence is all in—it is marked Plaintiff's Exhibit "F."

(Two papers (attached) are marked Plaintiff's Exhibit "G.")

Q. I hand you a paper marked Plaintiff's Exhibit "G" and ask you what that is?

A. It is a delivery receipt, original entry of shipment on the 25th of April, \$9.45, shipment of lumber.

Q. By whom is the delivery receipt signed?

A. C. W. Palmer.

Q. To whom was the material furnished?

A. To McCauley & Palmer.

Q. To them personally—did they take the lumber home themselves?

A. No, the Alaska Transfer Co. took it.

Q. For what building?

A. For the McCauley & Palmer building.

Q. Read what kind of lumber it was.

A. Two pieces 2x6—24; 4 pieces 2x4—24; 19 pieces 1x8—16 shiplap.

They are offered in evidence—same objection. They are admitted, [39—17] subject to consider-

(Testimony of R. R. Stewart.)

ation when all the evidence is in—marked Plaintiff's Exhibit "G."

(Two papers (attached) are marked Plaintiff's Exhibit "H.")

Q. I will hand you Plaintiff's Exhibit "H" and ask you what that is.

A. It is a delivery slip, a record of delivery April 25th, amounting to \$7.20.

Q. Delivery of what?

A. Lumber—2 pieces 2x12 and four pieces 11¼ by 12, delivered to the Alaska Transfer Co. and receipted for by Norman McCauley.

Q. What is the date of that? A. April 25th.

Q. What is such material as that used for?

A. That is some studding for some steps,—stepping and stringers, building steps.

Q. (By the COURT.) Inside or outside of the building? A. Inside.

Judge LYONS.—Inside?

A. Presumably.

Mr. RITCHIE.—We move to strike the presumption.

By the COURT.—It will be received under the same ruling.

Q. Are there any outside steps to this building?

A. I wouldn't say.

Q. Don't you know?

A. I don't know whether there are any in the rear or not, any outside steps; there are no outside steps in front.

(The exhibit is admitted in evidence under the

(Testimony of R. R. Stewart.)

same objection and same ruling—marked Plaintiff's Exhibit "H.")

(Another paper is marked Plaintiff's Exhibit "I.") [40—18]

Q. I hand you Plaintiff's Exhibit "I" and ask you what that is.

A. Record of delivery April 26th—1 piece 2x12—16 and one piece stepping 11¼x12, 4 ft.—\$1.26.

Q. To whom delivered?

A. I couldn't possibly state to whom it was delivered.

Q. By whom was it purchased?

A. It was ordered by McCauley & Palmer.

Q. For what building?

A. For the McCauley & Palmer building.

Q. I will ask you to state what such material, such lumber as is mentioned in that bill, is used for?

A. One piece 2x12—16 would be used for—I judge, in connection with that other bill it is stepping material and material from which steps, stairs, would be built. There is other stair material—I know it would take more stepping than that to put in the stairs in the building.

The exhibit is admitted in evidence under the same objection and ruling—marked Plaintiff's Exhibit "I."

Q. I will ask you if you furnished all the lumber that went into that building?

A. I think so—I don't know of any other.

Q. There was no other lumber-yard here at that time, was there?

(Testimony of R. R. Stewart.)

A. Yes, Dalton had a yard down at the bay but I don't recall him ever sending any there. My understanding with McCauley was there was to be no lumber furnished by anyone else—we were to furnish the lumber for the entire building.

Q. Are there steps in the building? A. Yes, sir.

Q. What portion of the building?

A. Downstairs and basement steps, leading down into the basement and some steps—there are a few steps upstairs; the [41—19] main steps upstairs are in the next building, if I recollect correctly.

Q. It is a two-story building? A. Yes, sir.

Q. There are steps running from the first floor up to the second floor?

A. Most of them is stepping that was in the building adjoining, the drugstore building. I think there are a few steps, I wouldn't be positive, but I think there are a few steps from the level of the other building to the level of this building in the second story.

Q. (By the COURT.) Was the other building constructed at the same time this was?

A. No, sir—what building do you mean? The Cordova Drug Building? That building was already up and that building went on the side of this same building—they used those same steps, cut into their building to use the same stairs.

Q. Do I understand you that the Boyle drugstore joins this particular building? A. Yes, sir.

Q. On which side?

A. As I understand it, it was a kind of mutual

(Testimony of R. R. Stewart.)

arrangement—the steps leading downstairs go into the McCauley building and the Boyle drug company was entered by those steps that go down into the McCauley building.

(Another paper is marked Plaintiff's Exhibit "J.")

A. I hand you Plaintiff's Exhibit "J" and ask you what that is.

A. April 30th, 5 pieces 1x4—10 and 3 pieces 1x4—10, \$1.35—it is surface material—finishing material.

Q. By whom was it purchased?

A. By McCauley & Palmer. [42—20]

Q. For what building?

A. The McCauley & Palmer building.

Q. Was it delivered to them to be used in that building?

A. I couldn't say just now how it was delivered; it is a small item and a man could pack it very easily on his shoulder—it was ordered for the building.

(It is admitted subject to the same objection and ruling, and marked Plaintiff's Exhibit "J.")

(Two papers (attached) are marked Plaintiff's Exhibit "K.")

Q. I hand you Plaintiff's Exhibit "K" and ask you what that is.

A. It is a delivery receipt, a record of delivery on the 20th of May, \$2.40.

Q. Purchased by whom?

A. McCauley & Palmer.

(Testimony of R. R. Stewart.)

Q. For what?

A. For use in their building—it was received by *McCauley & signed for* by McCauley.

Q. What kind of material?

A. Finishing material, 1x8 and 1x10 surface, four sides. It is admitted in evidence under the same objection and ruling—marked Plaintiff's Exhibit "K."

(Another paper is marked Plaintiff's Exhibit "L.")

Q. I hand you Plaintiff's Exhibit "L" and ask you what that is.

A. This is a record of the mill work done on those pieces that went over to Bob Meehan's shop, May 30th amounting to \$1.75. It is those items that were sent right over to the Meehan shop.

Mr. RITCHIE.—The ones you spoke of awhile ago? A. Yes,—it is March 13th.

Q. That is for work that he did on the lumber?

A. Yes. [43—21]

Q. Was the lumber returned to you or returned to the building?

A. It was delivered direct to the building.

Q. Is that the bill you got from him?

A. No,—this is the charge we made for the mill work.

Q. When was that delivered?

A. I should judge it was delivered along about—there is an entry here, mill work by Meehan March 13th and 28th—the date of the invoice is May 30th—that is probably the date of the delivery.

(Testimony of R. R. Stewart.)

Q. Do you know whether this was delivered on May 30th or not or whether this is the date of the charge?

A. This is the date of the charge—it was delivered before that—come to think about it there were two deliveries; it was delivered in two different lots.

Q. Do you recall just the dates of the delivery?

A. No, I don't recall the dates of them.

(The receipt is admitted in evidence under the same objection and ruling—marked Plaintiff's Exhibit "L.")

(Two papers (attached) are marked Plaintiff's Exhibit "M.")

Q. I hand you Plaintiff's Exhibit "M" and ask you what that is.

A. This is a record of material delivered on June first, amounting to \$5.13 and received by Charles Goodall.

Q. Does it have Mr. Goodall's signature on it?

A. Yes, sir.

Q. What kind of material, is it?

A. It is finish material—stair rail, etc.

Q. Purchased by whom?

A. By McCauley & Palmer.

Q. For what building?

A. For the McCauley & Palmer building. [44—
22]

(Admitted under the same objection and ruling and marked Plaintiff's Exhibit "M.")

Q. What kind of material is that?

A. Finish material, surface four sides clear stuff.

(Testimony of R. R. Stewart.)

Q. It is all finish material, is it? A. Yes.

(Another paper is marked Plaintiff's Exhibit "N" (two papers).)

Q. I hand you Plaintiff's Exhibit "N" and ask you what that is.

A. Record of delivery 2d of June, to McCauley & Palmer, amounting to \$12.93, receipted for by Charles Goodall.

Q. To whom was it furnished?

A. McCauley & Palmer.

Q. To be used in what building?

A. The McCauley & Palmer building.

Q. What kind of material is it?

A. With the exception of the last item it is ordinary finishing material—2 pieces 2x4—16.

Q. What is that?

A. Scantling, dimension lumber; the balance is all finishing material.

(Admitted under same ruling—Plaintiff's Exhibit "N.")

(A paper is marked Plaintiff's Exhibit "O.")

Q. I hand you Plaintiff's Exhibit "O" and ask you what that is.

A. Record of material delivered on June 2d to McCauley & Palmer.

Q. For what amount?

A. \$2.53, for lumber; all finishing lumber.

Q. To be used where?

A. In the McCauley & Palmer building.

Q. That is finishing lumber? [45—23]

A. Yes, sir—moulding, etc.

(Testimony of R. R. Stewart.)

(Admitted under same ruling—Plaintiff's Exhibit "O.")

(Another paper is marked Plaintiff's Exhibit "P.")

Q. I hand you Plaintiff's Exhibit "P" and ask you what that is.

A. A record of material delivered June third to McCauley & Palmer.

Q. For what building?

A. The McCauley & Palmer building.

Q. What is the amount of it? A. \$3.05.

Q. Of what does the material consist?

A. It is all finishing material.

Q. Purchased by whom?

A. McCauley & Palmer.

(Admitted under same ruling—Plaintiff's Exhibit "P.")

(Another paper is marked Plaintiff's Exhibit "Q.")

Q. I hand you Plaintiff's Exhibit "Q" and ask you what that is.

A. A record of material delivered June fourth to McCauley & Palmer, 54 cents.

Q. For what building?

A. For the McCauley & Palmer building—all finishing material; there is one piece of scantling, common lumber and the rest is finishing material.

(It is admitted under same ruling—Plaintiff's Exhibit "Q.")

(Another paper is marked Plaintiff's Exhibit "R.")

(Testimony of R. R. Stewart.)

Q. I hand you Plaintiff's Exhibit "R" and ask you what that is.

A. A record of delivery of June 10th, \$2.14, to McCauley & Palmer.

Q. For what?

A. Finishing material. [46—24]

Q. For what building?

A. For the McCauley & Palmer building.

(Admitted under same ruling—Plaintiff's Exhibit "R.")

(Two papers (attached) are marked Plaintiff's Exhibit "S.")

Q. I hand you Plaintiff's Exhibit "S" and ask you what that is.

A. Delivery slip—record of material delivered on July 8th to McCauley & Palmer—24 cents.

Q. For what? A. Finishing material.

Q. For what building?

A. McCauley & Palmer building,—receipted for by McCauley.

(Admitted under same ruling—Plaintiff's Exhibit "S.")

(Two papers (attached) are marked Plaintiff's Exhibit "T.")

Q. I hand you Plaintiff's Exhibit "T" and ask you what that is.

A. It is a record and delivery slip of lumber delivered August 6th to McCauley & Palmer, signed for by McCauley—\$3.00.

Q. Receipted for by McCauley? A. Yes, sir.

Q. For what building?

(Testimony of R. R. Stewart.)

A. The McCauley & Palmer building.

Q. To be used in that building? A. Yes, sir.

Q. Of what does the material consist?

A. 1x12 lumber, surface, one side.

Q. Is that finishing lumber or not?

A. No—it could be used for finishing,—it is not finishing material.

Q. What is such lumber ordinarily used for?

A. Used for binding or boarding up,—may be used for a great many things; it might be used for finishing.

(It is admitted under same ruling—Plaintiff's Exhibit "T.") [47—25]

AFTERNOON SESSION.

Continuation of the Direct Examination of Mr.
STEWART by Mr. BORYER.

Q. What is the total amount of your bill for the lumber and materials furnished for this house?

A. \$3,480.36.

Q. Has there been any credits on this?

A. Yes, sir.

Q. What is the amount of the credits?

A. A credit of \$1,243.79.

Q. When was the last credit on this account paid?

A. July 8, 1910.

Q. What was the amount of it? A. \$175.

Q. When was the next to the last amount paid?

A. On July 7, 1910.

Q. What was the amount of that? A. \$150.

Q. That leaves a balance of how much?

A. 2236.57.

(Testimony of R. R. Stewart.)

Q. Has any part of that been paid?

A. No, sir.

Q. Did you have any conversation with Mr. Borden at or about the time that you entered into the contract with McCauley to furnish the material for this house? A. Yes. I think I did.

Q. Regarding the materials to be furnished for this house? A. Yes.

Q. Do you recall about what date that was?

A. I judge it was along about February 20th,—about that.

Q. What was that conversation? [48—26]

A. I think it was the time he came down to order some lumber and he simply told me that he had made arrangements with McCauley to put up a building on the property.

Q. Was there any other conversation?

A. No, not at that time.

Q. Did he ask you if you had made arrangements with McCauley for furnishing lumber?

A. Yes, he asked if McCauley had been down and made arrangements for furnishing him lumber and I told him he had.

Q. Had you furnished any lumber, any material, to Borden prior to having furnishing material to Mr. McCauley? A. Yes, sir.

Q. What was that material?

Mr. RITCHIE.—We object to that unless it is shown it went into this building.

Q. Did you furnish any material to Borden prior to having furnished material to McCauley, for this

(Testimony of R. R. Stewart.)

particular building? A. Yes, sir.

Q. Do you know what that material was used for?

A. For the foundation work on the building.

Mr. RITCHIE.—We move to strike that out; the foundation was separate from the building and was owned by Mr. Borden.

Objection overruled. Defendant allowed an exception.

Q. When was that material furnished?

A. We commenced delivery on February 20, 1910.

Q. Did you furnish any material on the 21st of February? A. Yes, sir.

Q. For what was that used?

A. For the foundation.

Q. Did you furnish any material on the 22d?

A. Well, I couldn't say; there is another entry but it is not [49—27] dated, presumably it was on the 21st—two loads.

Q. Did you furnish any on the 23d?

A. Yes, sir.

Q. To whom? A. To W. Borden.

Q. Did you furnish any on the 24th?

A. No, sir.

Q. Then the material you furnished on the 20th, 21st and 23d was to Mr. Borden? A. Yes, sir.

Q. To be used for what purpose?

A. Used for building the foundation of this building.

Q. Of the building for which you furnished the material to Mr. McCauley?

A. To McCauley, yes, sir.

(Testimony of R. R. Stewart.)

By the COURT.—The first time material is alleged to have been sold to McCauley was on the 23d?

Mr. BORYER.—Yes, sir.

Q. Who ordered this lumber?

A. Mr. Borden himself, if I remember correctly.

Q. I have reference to the lumber for the foundation—was Mr. Borden working there on the foundation?

A. He was around there—I don't know whether he was working there.

Q. Was he or was he not present and knew of the furnishing of the material furnished by you to McCauley?

A. I know he was present on the arrival of considerable of it—I wouldn't say he was there when all of it arrived, but he was there when a great deal of it arrived.

Q. Was he around about the building? [50—28]

A. He was.

Q. And knew of the erection and construction of the building? A. Yes, sir.

Q. And knew you were furnishing lumber to them? A. Yes.

Q. When was Mr. Borden's bill paid by him for the material furnished for this foundation?

A. Paid on the first of March.

Q. (By the COURT.) What was the date of the first credit on that bought by McCauley?

A. The first credit on account of money was March 31st; there were credits for returned lumber

(Testimony of R. R. Stewart.)

before that, but that is the first money credit.

Q. When did you file your lien? I believe that is admitted—

Mr. RITCHIE.—Yes, I believe so; the records would be the best evidence. It is admitted to be the 6th of September, I believe.

The WITNESS.—September 6th.

Q. What is the size of that building?

A. 25x100.

Q. What is the size of the lot? A. 25x100.

Q. Did you have any conversation with McCauley before he left here? A. I did.

Q. Where is McCauley now?

A. I don't know where he is now.

Q. Is he in Alaska?

A. I couldn't say—I don't think he is, though.

Q. Is he in Cordova?

A. He is not in Cordova. [51—29]

Q. Did you have any conversation with him prior to his departure? A. I did.

Q. Regarding the finishing of this house?

Mr. RITCHIE.—We object to this as not binding upon Mr. Borden—any conversation between Mr. Stewart or anyone representing the Arctic Lumber Co. with Mr. McCauley.

Mr. BORYER.—We desire to show that there was a conversation between Stewart and McCauley that he had not completed the building and that he wanted more lumber for the purpose of building it.

By the COURT.—This is pertinent regarding McCauley and it may or may not be regarding the

(Testimony of R. R. Stewart.)

other parties, depending somewhat upon the testimony yet to be adduced. Objection overruled. Defendant excepts.

Q. What was that conversation?

A. I learned that Mr. McCauley was going out and I naturally went to him in regard to the account and building; he told me he was going to settle his estate, an estate in which he was interested and that it was simply a question of his appearance in Seattle and signing the papers, a formality to settle the estate and would return and complete the building and pay the bills.

Q. Was that after or before you had filed your lien?

A. That was before—that was before we filed our lien.

Q. How long before?

A. I don't recall now just when it was.

Q. About how long?

A. It was just before he went out—I don't remember the date.

Q. Did you or did you not begin this action within six months after you had filed your lien? [52—30]

A. We did.

Q. What, if anything, did you pay for verifying and recording the lien?

A. I don't recall the amount just now.

Q. You state in your complaint it was \$3.65—is that correct? A. Yes, sir.

Q. What, if any, amount did you pay for preparing your lien? A. \$25, I guess.

(Testimony of R. R. Stewart.)

Q. At the time you entered into this contract with McCauley to furnish this lumber for the construction of this house, what, if anything, did he tell you or say to you in regard to the manner in which he was going to complete the cellar or basement of this building?

Objected to as not binding upon Borden. Objection overruled.

A. The plant he had when he commenced building was to use the basement for a skating rink in connection with the building that was to be built adjoining and was to be completed for that purpose.

Q. Did you sell him lumber or agree to furnish him lumber for that purpose, for the completing of that?

A. The price was given on the lumber necessary to do that.

Q. Has that basement ever been completed according to the statements that he made to you?

A. It has not.

Q. (By the COURT.) Could that be done without altering both buildings?

A. There was an arrangement made with the man next, who was going to build, and they were going to make or build his basement in such a way that he could open it out into this other basement. [53—31]

Q. (By the COURT.) Would that require, would that have required an alteration in the buildings already constructed,—not merely an addition, but would it require taking out and changing the work?

(Testimony of R. R. Stewart.)

A. Yes, it would require taking off the siding that he put on—that portion that was below the main story floor level.

Mr. BORYER.—That is all at this time.

Cross-examination by Mr. RITCHIE.

Q. This total amount that you have given includes all kinds of lumber and other construction material delivered in that building for any purpose?

A. Yes, sir.

Q. Some of this material was used for fixtures, was it not, inside?

A. In the store part? Where the store was?

Q. Yes. A. Yes, for shelving.

Q. And a little of it was used around Curley's restaurant?

A. Yes, I think it was—let me, see, I believe not, because we had a claim against Curley at the time and I don't think there was any of it went into the Curley restaurant.

Q. You were familiar with the inside of the room?

A. Yes, sir.

Q. And know how Curley's restaurant or cafe was arranged?

A. Yes—it was kept in a separate account altogether; we had a claim against Curley.

Q. There was a sort of partition with doors in it leading to Curley's restaurant?

A. No, I think not—not as I remember. [54—32]

Q. Didn't you have to go through doors to get to the restaurant?

A. Not as I remember it, no—I think it was a

(Testimony of R. R. Stewart.)

counter out in the open,—no partition there.

Q. Were not these five doors we had a dispute about, delivered in March, the doors leading into Curley's part of the room? A. No, sir.

Q. You are sure about that? A. Yes.

Q. Now, you say you first talked with Mr. Borden about the 20th of February?

A. Approximately,—I don't recall the date exactly.

Q. He then made a bargain with you to buy some material for the foundation? A. Yes, sir.

Q. Did he tell you he was putting in the foundation himself? A. Yes, sir.

Q. Did he tell you anything about a proposed building that was going on the foundation?

A. Yes—he told me he had made arrangements with McCauley.

Q. Did he tell you that McCauley & Palmer would own the building? A. Didn't tell me the details.

Q. He told you he owned the ground?

A. Yes,—said he had made arrangements with McCauley & Palmer and asked if they said anything about the matter.

Q. Don't you think that Borden mentioned to you at that time that he had leased the ground?

A. It is possible he did mention it was in the form of a lease. I don't recall exactly.

Q. About this last payment—that was \$175, the 8th of July? A. Yes. [55—33]

Q. That was paid in cash, was it, or do you remember? A. I couldn't say now just what it was.

(Testimony of R. R. Stewart.)

Q. Do you know now by whom it was paid?

A. I couldn't say.

Q. Was that paid for any specific account?

A. No, it was on the account—there was no specific bill—it was run as a straight open account.

Q. Did you see this property every day or nearly every day from the time Borden began building his foundation?

A. Very nearly every day.

Q. You were going by there nearly every day?

A. Yes, sir.

Q. And saw the progress of the foundation?

A. Yes, sir.

Q. And I suppose possibly talked to Goodall considerably?

A. Yes, I did, I guess.

Q. You had your talk with McCauley about the 23d, I believe, you said, when you started in furnishing the material?

A. I had a talk with him before—that is when we started to furnish him material.

Q. Your contract to furnish material was between McCauley & Palmer and yourself?

A. Yes, sir.

Q. Borden had no part in making that contract?

A. No.

Q. And you knew it was an entirely independent contract?

A. No, I did not know the nature of it except that they had some arrangement for building.

Q. You knew this,—that Borden owned the ground and that he had built the foundation?

A. I knew that from common report, from rumor

(Testimony of R. R. Stewart.)

on the street. [56—34]

Q. And to same extent from your talk with Borden, that he owned the foundation and had some sort of lease or arrangement by which they were to have the use of the ground?

A. Yes, some arrangement.

Q. And they were to put their superstructure on his foundation? A. Yes.

Q. Now, did you have any further talks with Borden about this building?

A. Had a talk on or about the first of March when he paid his bill.

Q. Did he give you any notice in writing at any time?

A. Yes, he paid his bill by mail, by registered mail, accompanied by a letter.

Q. Through the local office?

A. Yes, through the local office.

Q. This is the original of the letter you received. I will ask you if it is. A. Yes.

Q. You received that letter on its date?

A. I think it was the second of March I received it.

Mr. RITCHIE.—We offer this letter in evidence.

The letter is admitted, marked Defendant's Exhibit No. 1 and read to the Court by Mr. Ritchie, as follows:

[Defendant's Exhibit No. 1—Letter Dated March 1, 1910, W. H. Borden to Arctic Lumber Co.]

“Cordova, Alaska, March 1st, 1910.

Arctic Lumber Company,
Cordova, Alaska.

Dear Sir:

Enclosed find draft on Bank of Wayne, Goldsboro, N. C., for \$312.92 in full of your bill for lumber sold to me for the foundation structure on Lot 21 of Block 2 of the town of Cordova.

Under my lease with Messrs. Macauley and Palmer I agreed to erect the foundation on said lot and they agreed to erect the building thereon at their own expense and turn the same over to me at the end of five years to be then my property and free from debt or mechanics' liens as part consideration for said lease. They agreed to protect me from any mechanic's lien and this protection has been secured by my posting a mechanic's lien notice. [57—35] on the property according to law.

Respectfully Yours,
(Signed) W. H. BORDEN.”

Q. You read that letter on the first or second of March? A. Yes, sir.

Q. That didn't give you any new information that you didn't have before? A. Yes, sir.

Q. What was there in that letter you didn't know before?

A. He told me that he had posted a notice on the building.

(Testimony of R. R. Stewart.)

Q. You hadn't seen that notice? A. No, sir.

Q. Did you see the notice afterwards?

A. I went around hunting for it then.

Q. Did you find it? A. Yes, sir.

Q. Where was it?

A. It was in the basement on one of the posts, about the center of the building, down about 18 feet from the front walk. The level is 18 feet down and about halfway back on the building.

Q. On the north or south side?

A. On the vacant side.

Q. Mr. Boryer has handed me a photograph here—do you know who took that photograph?

A. Mr. Kenedy took the photograph.

Q. When?

A. I don't recall the date—it was about the time or shortly after we filed the lien—it was after we filed the lien, I couldn't say the date; it was evidently after this street, this board street was put in there, and at the time of the building that board street was not in. [58—36]

Q. That would be the next September?

A. Yes.

Q. What was the condition of the ground at that time, when you first saw this notice?

A. When I first saw it?

Q. Yes—was there any snow on the ground?

A. I don't recall—probably at that time there was a little snow on the ground.

Q. That was about the second of March?

A. Yes, sir.

(Testimony of R. R. Stewart.)

Q. Did you read the notice? A. No, sir.

Q. Why didn't you? A. I couldn't get to it?

Q. How far was it above you when you stood under it?

A. I couldn't get down to it on a ladder; no.

Q. Were there not people getting down to the ground where it was?

A. Not at that time, no, they were not?

Q. Don't you know as a matter of fact that the snow was piled up along by the side of the building and over the dirt that had been thrown out from the excavation from the foundation so you could stand on that and reach that notice this way (indicating) with your hand?

A. At the time I went to see it?

Q. Yes. A. No.

Q. You are certain you could not?

A. I didn't go down to measure it,—I couldn't get down to it but I looked at it from the sidewalk.

Q. About how far would you say it was from the ground where a [59—37] man would have to stand under it, from the ground or the snow on the ground?

A. I don't recall how much snow was on there at the time—it was ten or eleven feet from the ground about how much snow was there, I couldn't say.

Q. Didn't you say you would have to reach it with a 30 feet ladder, this morning?

A. Mr. Boryer stated you would have to get a 30 ft. ladder to get down to it.

(Testimony of R. R. Stewart.)

Q. From where?

A. From the sidewalk or where you disappeared to go down to it.

Q. It was, do you mean, 30 ft. from the floor of the building?

A. I don't know—I didn't make the statement.

Q. You don't know of any other way to get down to it except that?

A. Except climbing down, no; you might go way around the back at that time there was no street on the back there.

Q. You testified this morning in regard to some electric light fixtures that Mr. Macauley said he was going to put in—what were those?

A. He didn't state particularly what they were; he said simply he would wire the building for electricity and put in the electrical fixtures.

Q. And he was going to put in a steam plant?

A. So he told me.

Q. Was he going to buy those materials from you?

A. No, sir.

Q. You didn't furnish that kind of material?

A. I didn't furnish that kind of material.

Q. They would have nothing to do then with your contract? A. No. [60—38]

Q. You know something about building?

A. Yes.

Q. Steam plant and electric fixtures can be put in almost any time? A. Yes.

Q. And they are often put in years after a building is completed? A. Often, yes, sir.

(Testimony of R. R. Stewart.)

Q. There is one item here that I couldn't get quite straight this morning—the item of \$75.35 on the 8th of March. Do you know just what that material was used for? You said something about it being for a counter or bar?

A. That is the item that went to the Meehan shop,—that part of that item.

Q. It was for the counter and bar?

A. I suppose so from the nature of the stuff—I don't recall now.

Q. The counter and bar wouldn't be part of the building?

A. Yes, his intention when he started to build was to build a bar and counters.

Q. Here is an item of \$1.11, 2x4, etc., do you know what those are used for? A. No, sir.

Q. Do you know what part of the building they went into? A. No, sir.

Q. Do you know whether they went into the building? A. Yes, sir.

Q. How do you know that?

A. They were purchased for that purpose and delivered for that purpose. [61—39]

Q. Do you know where they went into the building?

A. I didn't stand there and see them put in.

Q. If they were used for some other purpose and not put into the building at all, you wouldn't necessarily know about it? A. No.

Q. The same would be true of this long list of stuff delivered on the 22d of April—although your bill is

(Testimony of R. R. Stewart.)

dated the 21st I see the memorandum 22d over it—this is a variety of stuff; stuff of the general character of that, timbers 6x6 and 4x6 and 2x6 and 2x4 and shiplap. Do you know whether any of that went into the building? A. It all went into the building.

Q. Do you know of your own knowledge?

A. I know it was bought for that purpose.

Q. Did you see any of it go into the building?

A. No, I didn't see it.

Q. What part of the building would that go into, that kind of material—what would it be used for probably?

A. I don't know exactly what that could be in that building—it could be used for building the little vault effect he has in there—I don't know that it did,—it could be used for that; the timbers to support it and the dimension stuff to stud it and the shiplap for siding around it.

Q. Here are other items on the 25th of April, 1x8, etc., shiplap. What would that probably be used for?

A. 2x6—it would be used for the same thing; any kind of construction work.

Q. That might be used for fixing up the bar?

A. No, it is not finishing lumber—it more likely was used in the basement or partitions or something. It could be used for any construction work, other than finishing; it would [62—40] be finished afterwards.

Q. Do you know of your own knowledge whether any of that went into the building?

(Testimony of R. R. Stewart.)

A. I didn't see it used there. I know it was bought for that purpose and delivered for that purpose.

Q. You don't know it actually went into the building?

A. No, I didn't stand there and see it put in.

Q. Here are two items on the 25th of April. Do you know whether any of that went into the building?

A. The same way. I know it was bought for the building and delivered there.

Q. 2x12-20—what would that be used for?

A. I judge that is for building some stairs.

Q. And the next item 1#x12-16 stepping. Do you know what steps that was used for?

A. I don't know definitely; no.

Q. You don't know whether that was used inside or out? A. I judge it was built in.

Q. Do you know when the steps were built in the rear of the building?

A. No, I don't know but it was built of 2-inch stuff and that is 1 $\frac{1}{4}$ stepping.

Q. Here are a couple of items on the 28th of April, 1910—10x2, 12x16-1 $\frac{3}{4}$ etc.?

A. That is stepping.

Q. Do you know where that went? A. No.

Q. You don't know whether it went into the building at all or not?

A. I didn't see it put in; no.

Q. April 30th—5 pieces 1x4-10 clear and three pieces ditto. What was that used for? [63—41]

(Testimony of R. R. Stewart.)

A. Finishing up.

Q. Inside? A. It is finishing lumber.

Q. Probably for fixtures? A. It might be.

Q. Do you know whether any of that went into the building? A. I believe it all went in.

Q. Except for your belief, you don't know anything about it? A. I didn't see it put in, no.

Q. May 20—2 pieces 1x8-16 clear and two pieces 1x10-16 clear, \$2.40—do you know whether that went into the building?

A. I didn't see it used—I think it went in there.

Q. This mill work by Meehan—March 13th and 28th—\$1.75—the item was May 30th, but the work was done March 13th? A. Yes.

Q. June 1, 1910—here are four items—3x3-18 clear; 2x2-14 clear; 1x5-16 clear; and 14 Lin. 3x4 stair rail—what is that?

A. 14 linear feet of $\frac{3}{4}$ stairway.

Q. Do you know whether any of that went into the building?

A. I think it did—it was sold for that purpose. I didn't see it used.

Q. Do you know what became of that stairway?

A. No.

Q. Was it used for the stairway in the rear of the building?

A. No, it is not that kind—that is the finished rail used back there.

Q. You couldn't say what became of it of your own knowledge? A. No.

Q. June 2d. Here are a lot of items of different

(Testimony of R. R. Stewart.)

sizes and [64—42] assortments, about eight different varieties. Do you know whether any of that went into the building?

A. I didn't see it put in. It was sold for that purpose.

Q. June 2d. Here are some more—2" moulding; 1 piece 4x4—12; 2 pieces 2x2—14; 8 linear feet 4" crown; 80 linear feet quarter round. Do you know where that was used?

A. No, I couldn't say definitely where it was used.

Q. You couldn't say what part of the building it went into, if it went in at all? A. No.

Q. It might be used for a variety of purposes?

A. Yes, sir.

Q. It might be used on fixtures?

A. It might be used on fixtures.

Q. But you don't know?

A. I don't know definitely where it went.

Q. June 3d. Here is clears and blind stop and more clears and bed moulding. Do you know whether any of that went into the building?

A. The same answer. I didn't see it used.

Q. June 4th—three items. Do you know whether any of that went into the building? A. No.

Q. June 10th. Four items—clear, panel moulding and two items of bed moulding.

A. I didn't see it go in.

Q. July 8th—24 linear feet of quarter round, 24 cts. Do you know what became of that? A. No.

Q. Do you know whether it remained there?

A. Only from what Mr. Macauley told me. [65—43]

(Testimony of R. R. Stewart.)

Q. Do you know whether it ever went into the building, any place at all?

A. Not by my own eyesight. I asked Macauley if it was for the use of the building and if he put it in, and he said he did.

Q. When did he tell you that? After you had delivered it to him did he tell you it had been put into the building?

A. Yes, I think he did—after he put it in—he said it had been used in the building.

Q. Were you there after that? A. Yes, sir.

Q. Did you ever notice two small pieces of quarter-round standing up by the wall a few feet from the stairs? A. No, sir.

Q. August 6th—Macauley \$3.00—6 pieces 1x12—8—48 ft.; 1 piece 1x12—10—10 ft.; 3 pieces 1x12—14—42 ft. altogether 100 ft. at \$30 a thousand \$3.00—that is a correct bill, is it? A. Yes, sir.

Q. That was delivered to them? A. Yes, sir.

Q. Do you know what became of it? A. No.

Q. Did you ever see it afterwards? A. No.

Q. Did you ever see it down in the basement?

A. No.

Q. How often were you in the basement after that? A. I don't think I was in there—

Q. You were in off and on?

A. If I was looking for anything particularly—I went down there once or twice to find a man. [66—44]

Q. Don't you know as a matter of fact that it laid there until Jimmy Flynn moved in and used it?

(Testimony of R. R. Stewart.)

A. No, sir—it was purchased for the purpose of going into the building.

Q. You don't know whether it went in or not?

A. I didn't see it used.

Q. You have noticed the dates of these items here? A. Yes, sir.

Q. Here is one June 10th, \$2.14; here is one July 8th, 24 cts.; another August 6th for \$3.00. Were not those delivered on the ground for the express purpose and with the express agreement between you and Macauley to try to keep alive the lien?

A. They were delivered by his request for the purpose of entering the building—it was understood between us that it would keep alive the lien.

Q. Do you know when Macauley & Palmer began to occupy that building?

A. No, sir, I don't know when.

Q. Approximately when?

A. I couldn't say approximately. I suppose they were in there. It seems to me I recall their being in there on the 4th of July.

Q. The last large delivery of lumber according to your bills here was about the middle of April, was it not? A. Yes.

Q. Didn't you know then that the building was practically finished when you ceased to deliver large quantities of lumber?

A. No, it was not finished by any means. The plastering had [67—45] to be done and there was considerable stuff to go in afterwards.

Q. Do you know when Mrs. Mattern went up-

(Testimony of R. R. Stewart.)

stairs? A. No, sir.

Q. Don't you know it was before the first of May?

A. I don't recall any dates about that.

Q. Do you know when the plastering was done?

A. Not definitely. I could look when the plaster was delivered there—it is itemized on those bills. I presume about that time.

Q. Do you know when the pointing was done?

A. No.

Q. Palmer went away a few days before Macauley, didn't he?

A. I couldn't say positively—I don't recall.

Q. When this stuff was delivered in June, don't you know the building was entirely completed?

A. No.

Q. This clear, panel moulding and bed moulding, June 10th—\$2.14—that wouldn't add very much finish to the building, would it?

A. Considerably—I don't know how much it was necessary for the building.

Q. When you delivered this 24 cts. worth of quarter-round on the 8th of July, I understood then that the building was all finished except that 24 cts. worth of lumber? A. No, sir, it was not.

Q. What else was then to be done on it?

A. That siding never has been put on.

Q. How about that siding? Is it not a complete building without that? [68—46]

A. No. After this they had to put on some roofing on there to keep the water out—there was nothing but the green shiplap on there.

(Testimony of R. R. Stewart.)

Q. When was that put on?

A. Some time after Macauley moved out and went away.

Q. That was no part of the original contract, was it?

A. The roofing was not, no—he never got the material that he was going to get for that purpose.

Q. So far as ordinary use was concerned, the building was completed for three or four months before Macauley went away?

A. That depends. They used the building, but it was not completed by any means.

Q. And these little bits of lumber, from 24 cts. to \$3 worth delivered every 29 or 30 days, didn't go very far toward adding to the building, even though they were put in?

A. It went that far. The reason the building wasn't finished, was dragging, was because he hadn't received the money to complete it yet.

Q. Hadn't received the money to pay for it?

A. No.

Q. It has been a habit of your company when they wanted to preserve a lien or thought they were doing it, when they were doubtful about collecting their bills, to throw off one or two dollars worth of goods every 29 or 30 days?

Objected to—objection sustained.

Q. How often did you see the building during the summer? A. I would pass it regularly.

Q. You were inside sometimes? A. Yes, sir.

(Testimony of R. R. Stewart.)

Q. Did you see anything about it that was unfinished? A. Yes.

Q. What was it?

A. A number of things were unfinished—the basement never was finished.

Q. Now, a short time after the building was nominally completed—that is, completed sufficiently so the tenants could go into it—there were some changes made in the bar-room and show-window?

A. I think so—there were some changes in those details of the show-window.

Q. That was done two or three times?

A. I really couldn't say as to that.

Q. Mr. Goodall did that?

A. I really couldn't say as to that—he did a great deal. There was one or two receipts signed by Goodall for material later than that.

Q. Do you know anything about that stairway in the rear? A. Nothing in particular, no.

Q. That extends beyond the building?

A. It is on the outside of the building.

Q. You testified a little while ago that the building covers the entire lot?

A. To the best of my knowledge I think it does—it looks like it—it hangs over the street.

Q. The stairway is in the street? A. Yes, sir.

Q. You don't know anything about these various little items of material that were delivered from the last of April to the 6th of August further than that they were ordered by Mr. Goodall, to be sent to that building? [70—48]

(Testimony of R. R. Stewart.)

A. For the purpose of entering the building; yes, sir.

Q. You don't know whether they went into the building? A. I didn't see them actually used.

Q. You don't know whether they were for repairs or anything of that kind—you simply know that they were sent to the building by his order?

A. Yes, sir.

(By Mr. BORYER.)

Q. They have asked you about the stairway. Is that attached to the building? A. Yes, sir.

Q. At the time you began furnishing lumber, did you see the contract between Borden and the lessees? A. No, sir.

Q. Do you know whether that contract was of record at the time?

A. I did not know at the time.

Q. Don't you know that it was not of record at the time you began furnishing lumber?

(Objected to as immaterial and irrelevant. Objection overruled. Defendant allowed an exception.)

A. I really don't know—didn't know at the time if they had a written contract whether it would have to be recorded or not.

(A paper is marked Plaintiff's Exhibit "U.")

Q. I hand you Plaintiff's Exhibit "U" and ask you what that is?

A. This is a certified copy of a contract between Borden and Macauley & Palmer.

Q. Does it show when it was recorded?

(Testimony of R. R. Stewart.)

A. Yes, sir.

Q. What is the date shown on that? [71—49]

A. It is filed for record in this office the first day of March, 1910.

Q. That is the recorder's certificate?

A. Yes, sir.

(The contract is admitted in evidence, without objection, marked Plaintiff's Exhibit "U" and read to the Court by Mr. Boryer, as follows:

[Plaintiff's Exhibit "U"—Lease Dated February 17, 1910, Between W. H. Borden and N. D. MacCauley et al.]

"THIS INDENTURE, Made this 17th day of February, A. D. 1910, by and between W. H. Borden, of Cordova, Alaska, the party of the first part, and N. D. Macauley and C. W. Palmer, the parties of the second part—

WITNESSETH:—That the said party of the first part for and in consideration of the rents hereinafter specified to be paid and reserved, and the covenants of the parties of the second part, hereinafter specified to be kept and performed, has Let, Leased and Demised, and by these presents does Let, Lease and Demise unto the said parties of the second part, all of that certain parcel of land situated in the town of Cordova, in the Territory of Alaska, and particularly described as Lot twenty-one (21) of Block two (2) of the town of Cordova, as the same appears on the map and plat of said town on file in the office of U. S. Commissioner in Cordova, Alaska.

TO HAVE AND TO HOLD, Unto the said parties of the second part, his heirs and assigns, for the period of five years from and after the first day of April, 1910.

In consideration of this lease the parties of the second part covenant and agree to pay to the party of the first part, his heirs or assigns, a monthly rental of seventy-five dollars (\$75.00) to be paid in advance on the first day of each and every month during the running of this lease, and the parties of the second part covenant to pay the said rent for the full period of five years as hereinbefore stipulated, and it is agreed that if they shall so fail to pay said rent that the whole sum of rent for the entire unexpired term of this lease shall at the option of the party of the first part then and there become due and payable.

The party of the first part agrees to grade said lot and to put in at his own expense a good and suitable foundation for a building two stories and a basement in height to cover the entire lot, to-wit: 25 feet by 100 feet in size more or less, the same to be done at once with due diligence.

The parties of the second part agree to at once commence and to fully finish a building on said lot, at their expense to be twenty-five feet by one hundred feet in size and two stories and a basement in height, and to wire the same for electric light and telephone and to equip the same with steam heat and radiators, said steam heat to be either furnished by a boiler in the building or from and through steam pipes from outside the building, and to fully

complete and install suitable plumbing [72—50] for water, with toilet and wash basins complete, it being expressly understood that the steam heating plant and appliances, including radiators and wiring and plumbing and toilets and wash basins shall be considered as part of the building, and are not to be removed therefrom. It is also agreed that the parties of the second part pay for the electric light and water.

The parties of the second part covenant and agree to pay for all material and labor in the construction of said building and that they will protect the said property from any lien on account of said building, and their failure so to do shall, at the option of the party of the first part, terminate this lease.

It is further agreed that any arrangement made with the owners of Lot 22 in said block 2, adjoining this leased lot, concerning right of way or the use of stairs or the like shall inure to the benefit of the party of the first part, at the termination of this lease or the forfeiture thereof under the provisions thereof.

The parties of the second part agree to insure the building to be constructed on said lot against loss by fire in a sum not less than twenty-five hundred dollars and in case of the destruction or damage of said building by fire the sum of money collected on account of said insurance shall be used in rebuilding or repairing the same if the parties of the second part shall so desire, or if they fail so to rebuild or repair said building the sum of money so collected on account of said insurance shall be paid to and for the

use of the party of the first part.

It is expressly agreed and understood and made a condition precedent to this lease that the parties of the second part shall not assign or transfer the same without first obtaining the consent of the party of the first part.

Time is hereby declared to be the essence of this indenture, and the failure of the parties of the second part to pay any installment of rent when due as herein provided shall at the option of the party of the first part render this lease null and void, and the party of the first part may thereupon enter said premises and remove all persons therefrom.

The parties of the second part covenant that they will not remove any building or permanent improvement from the said lot during the life of this lease.

The failure of the parties of the second part to perform any of the covenants herein contained shall in like manner render at the option of the party of the first part this lease null and void.

The parties of the second part agree to pay all taxes that may be levied or assessed against said property during the running of this lease. [73—51]

The parties of the second part covenant and agree that at the expiration of this lease or its termination as herein provided for, they will quietly and peaceably surrender the possession of the premises to the party of the first part, his heirs or assigns, together with the building thereon and all improvements including steam heating appliances, plumbing and toilets, wash basins, etc., and wiring.

The party of the first covenants to and with the

parties of the second part, paying the rents as herein provided, and observing the covenants herein contained shall and may quietly and peaceably have and hold the said premises for the full term herein expressed.

In witness whereof the said parties have hereunto set their hands and seals this 17th day of February, 1910.

Done in Presence of:

W. H. BORDEN.

N. D. MACAULEY.

C. W. PALMER.

United States of America,
Territory of Alaska,—ss.

On this 17th day of February, 1910, before me, the undersigned Notary Public, personally came W. H. Borden, N. D. Macauley and C. W. Palmer to me known to be the identical persons named in and who executed the foregoing indenture, and acknowledged to me that they signed and sealed the same as and for their voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal this 17th day of February, 1910.

[Seal]

JOHN GOODELL,

Notary Public for Alaska.

Filed for record this first day of March, 1910, at
3 o'clock P. M.

O. A. TUCKER,

U. S. Commissioner and Ex-official Recorder.

(Testimony of R. R. Stewart.)

United States of America,
District of Alaska,—ss.

THIS IS TO CERTIFY, That the foregoing four sheets contain a full, true and complete copy of that certain instrument in writing therein set forth, and that the same is of record in the office of the undersigned, Commissioner of the Precinct of Cordova, District of Alaska, on page 191 of Miscellaneous.

In witness whereof I have hereunto set my hand and official seal, this 9th day of November, A. D. 1911.

[Seal]

O. A. TUCKER,
Commissioner and Ex-officio Recorder.” [74—52]

Q. You have been asked about this notice that was posted on this building or on the foundation—how far is this notice from First Street?

A. It is about midway of the building lot or approximately 50 feet.

Q. The building faces on First Street, does it not?

A. Yes, sir.

Q. Is this building built or is it not built in a gulch below the street?

A. In the ground below the street.

Q. How far below the street is the ground—how far is it from the street to the ground?

A. At the sidewalk?

Q. Yes, in front of the building.

A. I should judge it was in the neighborhood of 24 feet, somethink like that.

Q. In order to get from the street to where this notice was posted, how could you get there?

(Testimony of R. R. Stewart.)

A. At what time? When I was looking at it?

Q. Yes.

A. The only way to get at it was to get a ladder and climb down from the sidewalk or go around the rear of the building and travel around the block and come along the ground under the building.

Q. What do you mean by going around the block?

A. Clear around through C Street and down to the street where—what was then the alley—it was not graded or anything; it was just an alley—go around there to the rear of the building and come along the side, that used to be on the level of the ground.

Q. After you got around on the level of the ground would you [75—53] be able to read that notice or not? A. No, sir.

Q. About what height is the notice from the ground? A. In the neighborhood of eleven feet.

Q. Have you measured it? A. No, sir.

(A photograph is marked Plaintiff's Exhibit "V")

Q. I hand you Plaintiff's Exhibit "V" and ask you if the street shown on that picture was in there at the time of the construction of that building—the street at the rear? A. No, sir, it was not.

Q. I will ask you if that picture shows the location of the notice that was posted on the building?

A. Yes, sir.

Q. I will ask you if you know when and by whom that picture was taken?

A. It was taken by Mr. Kennedy, a photographer

(Testimony of R. R. Stewart.)

here in the town at that time.

Q. Where is Mr. Kennedy now?

A. I couldn't say where he is now.

Q. Is he living in and around Cordova?

A. No, sir.

Q. I will ask you if that picture is a correct representation of the building and the point where the notice is posted on the building—at the time the picture was taken.

By the COURT.—Fix the time.

A. This was taken just after we filed our lien which would be in September, probably September 7th or 8th, 1910.

Q. Do you know if that is a true representation of the condition of the ground at the time that the notice was posted? [76—54]

A. No, I couldn't say at the time the notice was posted. I didn't look at that time, if there was any notice there.

Mr. BORYER.—We offer this in evidence.

Judge LYONS.—At the time that notice was posted there was no building there at all, so that picture would naturally be misleading as to the location of the notice.

Mr. BORYER.—I want to show the position of the notice, as of the date it was taken.

Judge LYONS.—We are willing to admit the position of the notice.

(The photograph is admitted as Plaintiff's Exhibit "V.")

Q. Just before this notice was served upon you—

(Testimony of R. R. Stewart.)

I think it is Defendant's Exhibit 1—had you had any conversations with Mr. Borden, prior to the delivery of this letter to you?

A. The day before, I think it was on March first, when Mr. Borden came to the office to pay this money and he had our statement with some typewritten statement on it to the effect that we agreed to—I have forgotten the wording of it—in accepting that payment we agreed and understood that any other material that was furnished for the building was to be paid for by somebody else, not by Mr. Borden.

Q. What did you tell Mr. Borden at that time?

A. I simply told him I couldn't sign any such statement.

(By Mr. RITCHIE.)

Q. At the time you talked with Mr. Macauley and made your arrangements with him to sell him lumber, did he tell you how he was holding that ground?

A. No, sir.

Q. He didn't tell you about his lease? [77—55]

A. No.

Q. He told you all about what he was going to put in the building but didn't tell you how long his lease was?

A. He was talking to me about the material for the building and we talked over the kind of building and what he was going to do, in order to get prices on the material to go into the building.

Q. You knew he had an arrangement—Borden had told you he had made satisfactory arrangements with Macauley, but neither one of them told you at

(Testimony of R. R. Stewart.)

that time what the general terms of the lease was?

A. No.

Q. You state you didn't go down to look at that notice because you couldn't reach it. A. Yes, sir.

Q. Don't you know the workmen were going down the theatre stairway all the time?

A. At the time this was called to my attention the studding for that building was up and they were working on the upper part of the building.

Q. How much of the studding?

A. All of the studding inside was up, all of the basement studding—they were up on the ground level.

Q. How much did they have above the foundation?

A. I don't recall just the amount, but they had the studding up and were working on the ground floor. They were putting some studding up on that.

Q. Wasn't the studding then with sleepers across it so you could go over across to the side of the building? Were there not boards and stringers along there that you could walk on? [78—56]

A. Yes.

Q. Did you see that building on the 24th of February or the day after you made the first delivery of lumber? A. I saw it nearly every day.

Q. At that time there was no superstructure at all above the foundation?

A. I wouldn't say positively, but I think on the 24th they had started to raise some studding.

Q. Was there any conspicuous place, other than on the foundation, where they could put up a notice

(Testimony of R. R. Stewart.)

that you know of, at that time?

A. They could have made a conspicuous place.

Q. What would be your idea of a conspicuous place?

A. They might have put it right on the sidewalk, where the lumber was being delivered.

Q. How far below that was the top of the foundation? A. About 18 feet.

Q. How did they get the material down?

A. They slid most of it down.

Q. And the workmen went down the stairway?

A. I don't know, probably by ladders—there was no stairway in at that time.

Q. (By the COURT.) I didn't understand whether you were around that property between the 24th day of February and the first of March?

A. I was there, yes, pretty nearly every day—I was along there.

(By Mr. BORYER.)

Q. How much lumber had you furnished up to and including the first day of March? [79—57]

A. Approximately a thousand dollars—I think on the first day of March they had \$1,004 and some odd cents.

Q. And your contract was for the purpose of furnishing material for the entire complete building?

A. Yes, sir.

(By the COURT.)

Q. This incomplete side where you say they afterwards determined to build something else, was there any windows in that side?

(Testimony of R. R. Stewart.)

A. No, it is that portion above what would be a light-well there—I don't recall whether there is any window in it or not now.

Q. The portion in the light-well?

A. Yes, the portion in the light-well is what they have since covered over, on account of the storms driving through there.

Witness excused. [80—58]

[Testimony of H. C. Feldman, for Plaintiff.]

H. C. FELDMAN, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BORYER.

Q. What is your business?

A. Hardware business, plumbing business.

Q. You reside in Cordova? A. Yes, sir.

Q. What, if any, connection did you have as agent or otherwise with the property known as the Borden property?

A. I done the plumbing work there; had a contract for the plumbing and figured on the heating job for the same building.

Q. With whom did you have this contract for the plumbing? A. With Macauley & Palmer.

Q. What, if any, arrangement was ever made with you or negotiations regarding the putting in of a heating plant in this building?

A. There was no arrangement made except that I gave them a figure on it, what it could be done for, and he told me he would have it done in the fall and I should have the job.

(Testimony of H. C. Feldman.)

Q. That was the fall of 1910?

A. That was the fall of 1910.

Mr. RITCHIE.—We move to strike that out as incompetent, irrelevant and immaterial to any issue involved in this suit.

By the COURT.—It may stand; the Court does not see its materiality at present. If he makes it material with other evidence it may stand.

Mr. BORYER.—It is for the purpose of showing that the building was not completed,—that the contract calls for a building in which a steam-heating plant will be put in. [81—59]

Q. Did you ever have any correspondence or negotiations with Mr. Borden regarding this same plant, steam-heating plant, to go into the building?

A. He wrote me one letter in which he complained that I did not answer his questions, and to induce me to answer his questions, he said, I might have something to say when the heating plant is going to be put in; that was some time in July I should think, he wrote me from Seattle.

Mr. RITCHIE.—We move to strike that out.

(Motion denied. Defendant excepts.)

Q. Had he written you prior to that time?

A. Yes, sir; he had written me every two weeks.

Q. Regarding the same matter—the heating plant?

A. No, in a general way about the building, etc.

Q. What was your connection with Mr. Borden at that time—your connection with the building?

(Testimony of H. C. Feldman.)

A. I caused Mr. Borden making that lease with Macauley.

Q. Were you looking after his property at that time, in his absence?

A. I was considerable of the time—in writing he generally authorized me—

Q. Were you collecting the rents at that time?

A. No.

Q. Had he given you any instructions regarding looking after the property in any way?

A. No, sir.

Q. Has the steam-heating plant ever been put into the building? A. No, sir, it has not.

Q. Do you know if that was one of the original plans for the construction of the building?

(Objected to as not the best evidence. Objection overruled.) [82—60]

A. I understood that way; yes.

Q. You don't know personally, do you?

A. Not any more than what Macauley told me, and Borden.

Q. Did Borden also tell you that?

A. He told me that a steam-heating plant was going in with the plumbing.

Cross-examination by Mr. RITCHIE.

Q. Do you know where Macauley & Palmer are now, or either one of them? A. I don't know.

Q. When did they leave town?

A. Palmer left, I believe, some time in June and Macauley in August, if I remember right.

Mr. RITCHIE.—That is all.

Witness excused. [83—61]

[Testimony of Austin E. Lathrop, for Plaintiff.]

AUSTIN E. LATHROP, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BORYER.

Q. Where do you reside? A. Cordova.

Q. What is your business?

A. Transfer business.

Q. Were you in the transfer business during the year 1910? A. Yes, sir.

Q. What is the name of your transfer company?

A. Alaska Transfer Company.

Q. I will ask you if you were around the building erected on the Borden lot on First Street, on this Lot 21, Block 2, during the month of February and March, 1910? A. I was.

Q. Were you around there daily?

A. I was there, yes, every day, delivering lumber—most every day.

Q. Delivering lumber for whom?

A. I was hauling lumber for Macauley.

Q. From what place?

A. From the Arctic Lumber Company.

Q. To what place?

A. To the Borden building or to the Macauley building.

Q. I will ask you if during the time you were there you ever saw any notice on the building or the premises upon which this lumber was delivered?

A. I never did—I never saw a notice.

Q. I will ask you if the notice had been placed in a conspicuous place on that property if you would

(Testimony of Austin E. Lathrop.)

have seen it. [84—62] A. I believe I would.

Q. I will ask you if all of the lumber that was turned over to you by the Arctic Lumber Company to be delivered to this lot was delivered by you to this lot?

Mr. RITCHIE.—We object to that unless he knows it of his own knowledge.

(Objection overruled. Defendant allowed an exception.)

A. It certainly was. We keep a check on our work and the drivers turn in a slip every night of the work they have done, signed by the contractor or somebody connected with the building.

Q. You keep a check on your business from day to day? A. Every day, every minute.

Q. I will ask you when you were delivering this lumber for this building if you saw Mr. Borden around the premises, the building, if you recall?

A. Yes. I first hauled lumber for Mr. Borden. Mr. Borden was around for some time after the building was under construction.

Q. Was around on the work?

A. Yes, sir, not on the work, not on the building particularly, but he was around.

Mr. BORYER.—That is all.

Mr. RITCHIE.—We have no cross-examination.

Witness excused. [85—63]

[Testimony of John E. Gray, for Plaintiff.]

JOHN E. GRAY, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BORYER.

Q. What is your business?

A. Foreman in the lumber-yard.

Q. You are connected with the Arctic Lumber Company, working for them? A. Yes, sir.

Q. Were you working for them during the year 1910? A. Yes, sir.

Q. Were you present at the time the lumber was delivered by the Arctic Lumber Company or by the Transfer Company to Mr. Borden's lot, the Old Crow place? A. I was in the yard, yes, sir.

Q. Were you up around the premises?

A. I made several trips up there.

Q. Did you help to unload any of the lumber that was delivered there?

A. I was there when they unloaded some, but don't remember helping unload any.

Q. Do you recall about what time that was?

A. In the spring.

Q. Some time after February or March, was it?

A. Around there—I know it was in the spring of the year.

Q. It was after you had begun furnishing lumber for this lot, was it? A. Yes.

Q. I will ask you if when you were there and around there, if you saw any notice posted on the property?

(Testimony of John E. Gray.)

A. I went up there looking for it once and I saw it. [86—64]

Q. When was that, do you recall?

A. Quite a while afterwards.

Q. After what? A. After my first trip.

Q. There has been a notice, a letter introduced here, signed by Mr. Borden to the Arctic Lumber Company—was it after that letter was written?

A. I don't remember.

Q. Who called your attention to it?

A. I couldn't say.

Q. Was your attention called to it by someone connected with the firm that you were working for?

A. They did call my attention to it—I don't know whether that was the first one or not.

Q. Had you been furnishing lumber there before that time? A. Yes, sir.

Q. For some time or not?

A. I had quite a lot in the street at the time; the first time I noticed the signed, I had to go to the sidewalk and look at it.

Q. Could you read it from the sidewalk?

A. I couldn't read it—I could just see the paper.

Q. In order to read it what would you have to do?

A. I would either have to go down a ladder or go down the bank and slide down 20 or 30 feet and go down below it and read it.

Q. Did you go down to read it? A. No.

Q. Do you consider that that was posted at a conspicuous place on the ground or property? [87—65] A. No.

(Testimony of John E. Gray.)

Q. (By the COURT.) You didn't know what it was, did you? A. No, I couldn't read it.

Cross-examination by Mr. RITCHIE.

Q. You say you didn't go down to read it?

A. No.

Q. In saying you would have to climb down to get to it, you are simply giving your conclusions from what you can remember, the way things were at that time?

A. That is the way the lumber went through; there was a kind of fall there and they slid the lumber down that way.

Q. How far was this above the top of the sign at that time? A. I don't know.

Q. If you had gone down there and stood under the notice could you have read it from there?

A. I couldn't tell you.

Witness excused.

[Motion of Defendant W. H. Borden for Nonsuit.]

Mr. BORYER.—We desire to call Mr. Gilbert but he is not present at this time. At the conclusion of his testimony the plaintiff will rest. His evidence will be that he did not see the notice and it was not in a conspicuous place.

(With the understanding that plaintiff can call Mr. Gilbert later and that Judge Lyons' motion may be considered as being made after the plaintiff's evidence is closed.)

By Judge LYONS.—The defendant W. H. Borden now moves, after the plaintiff, the Arctic Lumber Company, has closed its case for a nonsuit, for

the reason that the evidence adduced by the plaintiff during the trial is not sufficient to constitute a cause of action by the plaintiff against the [88—66] defendant W. H. Borden, and for the further reason that it has not made out its case so as to charge the property described in the complaint as the property of W. H. Borden with the lien on which this action is instituted.

[Order Denying Motion for Nonsuit, etc.]

By the COURT.—I think it is more satisfactory to take into consideration these matters on the argument of the case on its merits. The motion will be denied at this time without prejudice to the consideration of the matters urged in the motion on the final argument.

To which ruling of the Court counsel for defendant then and there duly excepted and the exception was by the Court allowed. [89—67]

Defense.

[Testimony of Charles J. Goodall, for Defendants.]

CHARLES J. GOODALL, a witness called and sworn in behalf of the defense, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What is your name? A. Charles J. Goodall.

Q. What is your occupation?

A. Carpenter and builder.

Q. How long have you been engaged as a carpenter and builder?

A. Well, I have been in the business ever since I was a boy with the exception of a few years mining.

(Testimony of Charles J. Goodall.)

Q. About how many years would that be?

A. About twenty years.

Q. How long have you lived in Alaska?

A. Twelve years.

Q. In what parts of Alaska have you lived?

A. Well, I have been in all parts of Alaska, Dawson, Nome.

Q. How long have you lived in the town of Cordova?

A. I came here in December, 1907—I came to old town.

Q. And how long have you lived in the new town?

A. Since they started the town in 1908.

Q. Do you know Mr. W. H. Borden, one of the defendants in this action? A. Yes, sir.

Q. How long have you known Mr. Borden?

A. I believe I met him in the spring of 1908 over at old town.

Q. Are you acquainted with his property on First Street in the town of Cordova, known as Lot 21 in Block 2? A. Yes, sir.

Q. You know where that property is? [90—68]

A. Yes, sir.

Q. Were you in the town of Cordova on or about the 17th day of February, 1910? A. Yes, sir.

Q. Do you know one N. D. Macauley and C. W. Palmer? A. I do.

Q. Where did you first meet those men?

A. Right here in Cordova.

Q. Did you ever have any business dealings with those gentlemen? A. Yes, sir.

(Testimony of Charles J. Goodall.)

Q. When was that?

A. Well, it was in the month of February I first met them.

Q. The month of February of what year?

A. 1910.

Q. I will ask you to state what that business was.

A. Well, they were going to build down here, got plans for a building and I took a contract to build it.

Q. To build where?

A. Where the building now is.

Q. On Lot 21 in Block 2? A. Yes, sir.

Q. Did you enter into a contract to put up that building with those men? A. Yes, sir.

Q. I now hand you a paper and ask you to state if that is the written contract you entered into with them? A. That is the one.

Q. Who signed that contract?

A. Macauley & Palmer. It is signed per Macauley, here, I see, and myself. [91—69]

Q. Were Macauley and Palmer partners?

A. Yes, sir.

(The contract is admitted in evidence, without objection, and marked Defendant's Exhibit 2. Judge Lyons reads it to the Court as follows:

[Defendant's Exhibit No. 2—Agreement Between MacCaulay and Palmer and Charles Goodall.]

“This agreement between Macaulay and Palmer, parties of the first part and Charles Goodal, party of the second part, Witnesseth,—

Goodall, party of the second part, agrees to do all

carpenter work on a building for parties of the first part on lot 21, in block 2, in Cordova, Alaska, according to the plans and following specifications,—the building is to be 25 feet by 100 feet more or less in size, with two stories and basement in height; street floor to be fitted with wainscotting about 5½ feet high, south wall above street level will be supported by a girder consisting of 2x16 planks spiked together and supported by enough posts to carry the weight. Party of the second part also agrees to make two bay windows in front on the second floor, and build stairway from street floor to basement. All studding and ceilings are to be left bare ready for lath and plaster. All studdings are to be placed 16 feet on centre except in basement where they will be placed 20 feet on centre. Building paper and one thickness of shiplap is to be placed on outside of studding, roof is to be covered with tar felt paper on shiplap and paper is to be well tarred.

The parties of the first part agree to furnish all material necessary to do all carpenter work above mentioned. The party of the second part agrees to do all said carpenter work in a substantial and workmanlike manner, to fit doors and windows properly and make all plate glass frames and partitions off office and toilet on street floor in a neat manner.

In consideration for all the above mentioned work the parties of the first part agree to pay the party of the second part the sum of \$1900, to be paid in the following terms:

One-third when frame is up and one-third when roof is on and outside covering is in place and one-

(Testimony of Charles J. Goodall.)

third when carpenter work is finished.

Witness:

MACAULAY and PALMER.

Per N. D. MACAULAY.

CHAS. GOODALL."

Q. When did you start in to put up that building?

A. I put in the foundation first and started in for Macaulay & Palmer on the 24th or 25th of February, I don't know which. I had the foundation in then.

Q. For whom were you working when you put in that foundation? A. Borden. [92—70]

Q. Did Macaulay & Palmer have anything to do with it, with the foundation, as far as you are concerned, as a contractor? A. No, sir.

Q. Who paid you for putting in that foundation?

A. Borden.

Q. Was that foundation completed before the other building was started? A Yes.

Q. The contract with Macaulay & Palmer was entirely a new contract? A. Yes, sir.

Q. Did you see a notice on this foundation on or about the 23d or 24th of February, 1910?

A. Yes, sir, I saw Borden nail the notice on it.

Q. Did you read the notice? A. I guess I did.

Q. Was that notice in such a place that any one interested might see it? A. Well, I think it was.

Q. State where the notice was.

A. Well, it was on one of the foundation posts, about, I should judge, 45 to 50 feet from the street, back on the side of the building. At that time it was probably about seven feet from the top of the snow

(Testimony of Charles J. Goodall.)

to the notice but that would probably amount to 11 or 12 feet from the ground.

Q. How far is the notice down on the post from the level of the foundation?

A. I don't remember now, but I think it is just below the sill.

Q. How wide is the sill? A. It is ten by ten sill.
[93—71]

Q. Ten inches by ten inches? A. Yes, sir.

Q. Can that notice be seen from the sidewalk?

A. You couldn't read it from the sidewalk,—you could see the notice but couldn't read it.

Q. Was there any part of the building up when that notice was put on—was first put on?

A. No, sir.

Q. You saw it there before you started in to touch the building? A. Yes, sir.

Q. Who furnished the lumber that went into that building?

A. Macaulay & Palmer—it came from the Arctic Lumber Co. yard.

Q. You had no contract with the Arctic Lumber Company so far as that lumber was concerned?

A. No.

Q. When did you finish your contract?

A. Why, about—I can tell exactly by looking at the book, but I think it was about the 14th or 15th of April.

Q. You may refer to that book if you wish to refresh your memory and state exactly when you finished your contract with Macaulay & Palmer.

(Testimony of Charles J. Goodall.)

A. Well, the last day we worked there was on the 13th of April—that is, on the contract work.

Q. Under your contract when were you to have that building completed so that it could be occupied?

A. Well, the first agreement that I made with Macaulay was to have the saloon part of it so they could do business on the 17th of March,—they were going to give an opening on the 17th of March, St. Patrick's Day, and then a few days before that he told me that he wouldn't be ready to open, that he hadn't got other things in shape, didn't have the stock [94—72] ready, but on the first of April he would be satisfied to have the barroom ready and then I could find time to finish upstairs.

Q. Do you know when he actually moved into the building?

A. I don't know exactly. I think he opened the saloon for business on the 5th or 6th of April, something like that—the first part of April, I think the 5th.

Q. How many men did you have in your employ working on that building during the time it was being put up?

A. The first couple of weeks I had fifteen men working there—of course I kept reducing them right along.

Q. When did you finally discharge your men?

A. The last two men was on the 13th of April—there were two men working then, nine hours each, on the 13th. That was the last men I had on the contract.

(Testimony of Charles J. Goodall.)

Q. Was the upstairs finished on the 14th of April, 1910? A. Yes, sir.

Q. Was it occupied?

A. Well, they were moving into it.

Q. Who was moving into it?

A. It is Mrs. Smith now,—it was Mrs. Mattern at that time.

Q. Who occupied the downstairs?

A. Macaulay & Palmer had a saloon downstairs.

Q. Were there any other carpenters ever worked on that building but yourself, on the 14th of April, or men in your employ?

A. No, there was two men put up a lunch counter for Curley. They worked there a couple of days putting up that lunch counter.

Q. Who was Curley?

A. He is a restaurant-man. He is over in Valdez now—Jack Curley, [95—73] I think.

Q. Did he have a restaurant in Mr. Borden's building at that time?

A. They fixed up for a restaurant but it never was opened up. It was just fixed up and stood there a week or so.

Q. Is that a plastered building? A. Yes, sir.

Q. Was the plastering finished on the 14th of April, 1910? A. Yes, sir.

Q. Upstairs and downstairs? A. Yes, sir.

Q. Was the building completed at that time?

A. It had the prime coat on the front. I don't think it had the second coat.

Q. I hand you a bill purporting to be the bill of

(Testimony of Charles J. Goodall.)

the Arctic Lumber Company rendered to N. Macaulay, dated the 22d day of April, 1910, and ask you if you know what that lumber was used for.

A. Yes, sir.

Q. What was it used for?

A. The platform in the rear—the first platform we put up there. It is in the rear, on the back of the building.

Q. Was that a part of the original building?

A. Well, it was not in my contract.

Q. It was no part of the original contract?

A. No, sir.

Q. Who employed you to put in that platform?

A. Macaulay.

Q. What was that platform used for?

A. Well, they wanted the platform at the back end, so people in the saloon could go out of the door and could sit on the [96—74] platform and look out on the bay. It was a nice place to sit.

Q. Was that in the original plans of the building?

A. No.

Q. That was just an addition to the building after the building was finished? A. Yes, sir.

Q. Here are two other bills rendered by the same company to Macaulay on the 25th day of April, 1910. I will ask you if you know what that lumber was used for.

A. Well, that was used for the stairs, for the stairs in the rear.

Q. The stairs in the rear?

A. There was at that time another short stair just

(Testimony of Charles J. Goodall.)

down the basement, going into the liquor room. This might have been used for that; there were about two or three steps put in there.

Q. Was that any part of the original plans of the building? A. No.

Q. That was a matter that was thought of after the original building was finished? A. Yes, sir.

Q. (By the COURT.) This platform and stairway on the back, is that on the lot or in the street?

A. That is in the street.

Q. Here is another bill rendered April 30th by the same company to Macaulay. I will ask you to state if you know where that lumber was used.

A. I know all the work that was done there but I couldn't tell exactly just where everything went in. I couldn't tell [97—75] whether it went on the shelving or counter or different things. I couldn't tell whether it went into the shelving or into the counter.

Q. But was it any part of the original building?

A. No, sir.

Q. This lumber that was furnished on April 30th or at any time during the month of April, after the 14th of that month, how did that come to be used?

A. Well, the things were thought of afterwards; for instance, the show window, they had that sealed up, in the back of the show window. Of course it kinder cut out the light in the bar-room, and Macaulay concluded to change that and take that all down, and he made a change in the show window,

(Testimony of Charles J. Goodall.)

and there was shelving on that side of the room. He had a kind of wholesale department, selling bottle goods, and he didn't have shelf room enough, so I added some more to it. Bob Meehan made the shelves in the first place and then he wanted more, which I built—I built a counter or two to be used in the same connection.

Mr. BORYER.—What bills have you reference to—bills of what dates?

Judge LYONS.—Furnished him in April, after the 14th.

Q. I hand you a bill rendered by the same company to Macaulay dated May 20, 1910, and ask you to explain if you know what that lumber was used for.

A. Well, as far as I can remember that is lumber that was used for shelves upstairs, for the lady that lived upstairs, Mrs. Mattern. I put some shelves up there in the living room and kitchen.

Q. Did you put up that shelving? A. Yes, sir.
[98—77]

Q. Who told you to put up that shelving?

A. I guess Macaulay told me to go up there. She wanted to see me—she wanted some work done. I think he told me first, or Palmer, to go up and see Mrs. Mattern. I was up there on different occasions in that way.

Q. Did you go up to see her? A. Yes.

Q. And what did she have to say?

A. She told me what she wanted.

Q. And what was that?

(Testimony of Charles J. Goodall.)

A. Well, she had a corner shelf to put in there and she had a shelf put up there where they put a curtain around it, as a kind of wardrobe to hang clothes on, with hooks in it.

Q. Who paid you for that?

A. I don't know who paid me for that particular job. She paid me once or twice—when I did work there she paid me sometimes and sometimes she didn't.

Q. Was it paid for, any of these items after the 14th of April, by this \$1900 or as an independent job?

A. No, that is an independent job entirely—that was paid extra.

Q. Now, here is another bill rendered by the Arctic Lumber Company to Macaulay on June 10, 1910. I ask you to examine that and state if you know what that lumber was used for.

A. I think that was used for building a counter.

Q. Where? A. In the saloon.

Q. Who built that counter? A. I did.

Q. Who employed you?

A. Either Macaulay or Palmer—I don't know which. [99—78]

Q. Was that any part of your original contract with Macaulay & Palmer?

A. No, I was paid extra for that.

Q. Now, here are bills rendered apparently on the first day of June, second day of June and third day of June, by the same company to Macaulay. I will ask you to examine those bills and state if you know

(Testimony of Charles J. Goodall.)

whether or not any of the lumber described in those bills was used in the construction of this building erected on Lot 21, Block 2.

A. No; some of this lumber was used in changing the show window and the office; the office used to be right up in the front, and then when he made the change in the show window, we moved it to the rear of the building, and added two sections to it—made it larger.

Q. Who did that work? A. I did.

Q. Who employed you?

A. Macaulay & Palmer.

Q. Were you paid extra for that work?

A. Yes, sir.

Q. (By the COURT.) Was that an alteration?

A. Yes, sir, that is an alteration.

Q. (By the COURT.) An alteration made after the finishing of the building? A. Yes, sir.

Q. I hand you another bill rendered by the Arctic Lumber Company to N. Macaulay dated July 8, 1910, and ask you if you know anything about the lumber described in that item or bill.

A. No, I don't know where it was used.

Q. Read that item. [100—79]

A. 24 linear feet of quarter-round.

Q. What is the amount of the bill?

A. Twenty-four cents.

Q. Did you ever see that 24 feet of quarter-round—24 cents worth of quarter-round?

A. I don't know anything about that particular piece. I saw quarter-round there that was not used.

(Testimony of Charles J. Goodall.)

Q. Where did you see that?

A. In the basement.

Q. In the basement of what building?

A. This building you are talking about.

Q. When did you see that?

A. I don't know just the date.

Q. About when?

A. During the summer some time, after I was working there.

Q. For how long a time did that piece of lumber lie in the basement, if you know?

A. I don't know.

Q. How many times did you see it there?

A. I couldn't tell that. I saw it different times—I couldn't tell.

Q. I hand you another bill rendered by the Arctic Lumber Company against N. Macaulay dated August 6, 1910. I will ask you if you know anything about \$3.00 worth of lumber, 1x12, different lengths, delivered there by the Arctic Lumber Company on or about August 6th, 1910. Did you ever see that lumber?

A. I couldn't tell when it was delivered, but I saw lumber there. It has been lying in the basement. It did lie there for quite awhile.

Q. When did you see it there? [101—80]

A. Well, I see it there a number of times. The last time I have any distinct recollection of it was that when Flynn & Courtright, the Cordova Commercial Company, moved into the building. It was

(Testimony of Charles J. Goodall.)

lying there then. It was in the way and they spoke about it.

Q. They spoke about it? A. Yes, sir.

Q. Who spoke about it?

A. They took that lumber and used it, when they were moving their stock from the Alaska Building up to this building—they put it on the cart to store stuff on, laid stuff on. I told Flynn to take care of it. I said, “I don’t know just who owns that lumber.” I said, “I understand there is a dispute about it or something and you had better take care of it.”

Q. And he said he would?

A. He said he would. He used a couple of boards on the stairway, sliding the boxes or something down into the basement, and the last I saw of some of it, it was lying on the sidewalk. After they got through moving I noticed the boards were lying on the sidewalk along with the truck they were using and I spoke to Courtright or Flynn about it, to take care of it. I don’t know whether they did or not.

Q. Did you have a conversation with Macaulay along early in the month of August about this lumber that was delivered in July and August?

A. Well, no particular conversation. I was down there and the lumber was there, and I asked him what that lumber was for and where it came from, and he said he just got it and I don’t know what he was going to do with it. [102—81]

Q. It was never used as far as you know?

A. No.

(Testimony of Charles J. Goodall.)

Q. You have taken considerable interest in that building?

A. Well, I have been agent for Mr. Borden, looking after it.

Q. Agent for what purpose?

A. I collected the ground rent from Macaulay & Palmer while they occupied it and did his collections afterwards.

Q. Are you his agent at this time? A. I am.

Q. Is that property rented at this time?

A. There are three rooms upstairs rented, one tenant.

Q. Do you know any other carpenter that ever used any lumber in that building but yourself and your workmen?

A. No; only in arranging the lunch counter there and another carpenter put up the electric sign upstairs and also a sliding shelf ladder, just hung the ladder on the outside. That is all anybody else did.
[103—82]

[**Minutes of Court, May 28, 1912**] **Trial Continued.**
In the District Court for the Territory of Alaska,
Third Division.

C. 11.

ARCTIC LUMBER CO.,

Plaintiff,

vs.

W. H. BORDEN et al.,

Defendants,

Now, on this day this cause came on again regularly for trial before the Court. Defendant being represented by E. E. Ritchie and John Lyons; the plaintiff being represented by R. J. Boryer, Esq., and the following proceedings were had, to wit:

WHEREUPON Chas. Goodall resumes the stand and testifies further as a witness on behalf of the defendant.

WHEREUPON Defendant's Exhibits Nos. 3 to 19, inclusive, were marked for identification.

WHEREUPON Defendant's Exhibits 3 to 19, inclusive, were admitted in evidence.

WHEREUPON Geo. K. Gilbert was sworn and testified in behalf of the plaintiff.

WHEREUPON W. D. Harris, Abe Courtwright, P. L. Simpson, John N. Johnson and H. H. Slater were sworn and testified in behalf of the defendant.

WHEREUPON W. H. Border was sworn and testified in his own behalf.

WHEREUPON Defendant's Exhibit 20 to 22, inclusive, were marked for identification.

WHEREUPON Defendant's Exhibit 20 to 22, inclusive, were admitted in evidence.

WHEREUPON defendant rests, and this being the hour of adjournment, the further trial of this cause is continued until [104] May 29th, at the hour of 10 o'clock A. M.

The above is a copy of the trial minutes found at page 285, Journal C. 1, under date of May 28th, 1912.

(Testimony of Charles J. Goodall.)

Tuesday, May 28, 1912.

MORNING SESSION.

Continuation of the Direct Examination of Mr.
GOODALL by Judge LYONS.

Judge LYONS.—I now desire to offer in evidence the bills which were explained by the witness Goodall before the Court adjourned yesterday afternoon, bills which correspond with the bills that were introduced by the plaintiff. They are copies of the original bills, marked Plaintiff's Exhibits "G," "H," "I," "J" and "F" and "E."

(They are admitted as Defendant's Exhibits 4, 5, 6, 7 and 8 and 3.)

Judge LYONS.—We now offer in evidence bills submitted by the Arctic Lumber Co. for the month of May as explained by the witness Goodell yesterday afternoon. They correspond with [106] Plaintiff's Exhibits "K" and "L."

(They are admitted as Defendants' Exhibits 9 and 10.)

Judge LYONS.—We now offer in evidence bills submitted by the Arctic Lumber Co. for the month of June and which were also explained by the witness Goodell and correspond with Plaintiff's Exhibits "M," "N," "O," "P," "Q" and "R."

(They are admitted as Defendants' Exhibits 11, 12, 13, 14, 15 and 16.)

Judge LYONS.—We also offer in evidence bill submitted by the Arctic Lumber Co. for the month of July, explained by the witness Goodall and marked

(Testimony of Charles J. Goodall.)

Plaintiff's Exhibit "S."

(It is admitted as Defendants' Exhibit 17.)

Judge LYONS.—We also offer in evidence the bill submitted by the Arctic Lumber Co. for the month of August which was explained by the witness Goodell, corresponding with Plaintiff's Exhibit "T."

(It is admitted as Defendant's Exhibit 18.)

Mr. BORYER.—Mr. Gilbert is here now and we would like to take his evidence and then recall Mr. Goodell.

By the COURT.—Very well.

Witness Goodall excused. [107—83]

[Testimony of George K. Gilbert, for Plaintiff.]

GEORGE K. GILBERT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BORYER.

Q. Where do you reside? A. Cordova.

Q. How long have you lived here?

A. Three years.

Q. What is your business?

A. Steam-fitting and plumbing.

Q. How long have you been in business here?

A. Three years.

Q. Did you or did you not do any work on the building and lot known as the Borden property in Cordova? A. I did.

Q. Of what did that work consist?

A. Various kinds of sheet metal work and plumbing.

Q. For what building?

(Testimony of George K. Gilbert.)

A. For the Old Crow Building.

Q. Is that the building that is on Borden's lot?

A. It is.

Q. About how long were you at work on that building, doing this work?

A. Practically two months.

Q. What months were they?

A. Part of March, I believe, the latter part of March. I can't be accurate about it without referring to my books, which I haven't got here—the latter part of March, April and May. Practically two months.

Q. Of 1910? A. Of 1910. [108—84]

Q. For whom were you doing this work?

A. For Macaulay & Palmer.

Q. Were you ever paid for that work?

A. In part.

Q. By whom.

A. Borden paid me \$200 and I received part of the balance from the receiver.

Q. In what? A. The bankruptcy proceedings.

Q. Of whom?

A. The Old Crow Liquor Co. and Macauley & Palmer.

Q. Did you file a lien on this property?

A. I did.

Q. For this work? A. I did.

Q. Did you start a suit to foreclose this lien?

A. Yes.

Q. Is that suit now pending? A. No.

Q. What became of it?

(Testimony of George K. Gilbert.)

A. It was settled out of court.

Q. Did you personally do this work on the property, the plumbing? A. My men did.

Q. Were you there yourself assisting in the work during that time? A. Yes.

Q. I will ask you if during the time that you were there working you saw a notice posted on this property? A. I did not.

Q. I will ask you if a notice was posted on this property in a [109—85] conspicuous place, if you would have seen it?

A. I think I would—I know I would.

Cross-examination by Mr. RITCHIE.

Q. How many conspicuous places are there on that building?

A. I couldn't figure them all, there are so many.

Q. What would you consider a conspicuous place?

A. Anywheres where it can be seen by anyone coming on the property.

Q. Anywhere on the building itself. Do you remember the situation of that building about the time the superstructure was started on the foundation, that is, the surrounding?

A. Yes, fairly well.

Q. Do you remember the condition of the street at that time? A. Yes.

Q. What was it—the street and sidewalk right in front? A. There was no street in the back.

Q. There was a sidewalk and street directly in front of the building?

A. There was a sidewalk put in after the building

(Testimony of George K. Gilbert.)

was started, directly in front of the property—there was nothing in the back.

Q. Do you remember about the time the foundation was finished and while the superstructure was going up that there was a railing upon the sidewalk in front of the building, with a warning sign there that it was dangerous and there was a big hole on the outside, to the rear of the sidewalk, the street side, that they slid lumber along? Do you remember that was the condition about that time?

A. No, I do not.

Q. Was there any place in front of that building where the [110—86] superstructure started where a sign might be put up on the lot?

A. Really, I don't know. I don't want to make a statement unless I am correct.

Q. When did you first go to work on the building?

A. I think I done some work in March, the latter part of March.

Q. How far along was the building at that time, when you first went there?

A. Well, I didn't do any work on this foundation. The superstructure was well along before I started to do any work.

Q. Your work was wholly inside?

A. Principally.

Q. And before you went in there to work did you pay any particular attention to the building?

A. No, I didn't pay any particular attention because I didn't have any reason to.

Q. It was winter time and there was a great deal

(Testimony of George K. Gilbert.)

of snow on the ground at that time?

A. There was some snow, yes.

Q. How much plumbing did you do on the building?

A. I can't tell you from memory, without referring to my books.

Q. Did you do any plumbing except for the bar?

A. Yes, I put in some waste pipes from the ice-house.

Witness excused. [111—87]

[**Testimony of Charles Goodell, for Defendant
(Recalled).]**

CHARLES GOODELL, recalled.

Further Direct Examination.

(By Judge LYONS.)

Q. I will ask you to state what was the condition of the street directly in front of this lot about February and March, 1910.

A. Well, the street wasn't filled in right in front of the lot. There was a big hole there and there used to be a bridge right out in the middle of the street. The crossing there was nothing but a bridge, and it was filled in afterwards by dirt, filled up in the centre of the street, but on that side of the building it was all open,—there was a big hole there and the sidewalk was practically a trestle or bridge. There was a big hole underneath the sidewalk and they put the lumber down there.

Q. Where was the traffic in the street?

A. That was out probably 20 ft. from the side-

(Testimony of Charles Goodell.)

walk, this way (indicating).

Q. There was no travel between the centre of the street and the sidewalk? A. No.

Q. What was under the sidewalk?

A. The sidewalk was carried on posts.

Q. How did you get your lumber down from the street on to this foundation, which was put up by Borden?

A. They used to slide it down under the sidewalk—they would slide it right down under the sidewalk.

Q. Was there any way to get down to this foundation other than this sliding down? A. Yes.

Q. What way was that? [112—88]

A. The way we used to go, there was a stairway going into the Grand Theatre—that was under the Cordova Drug Store and that stair started about one-third out into the street, the stairs started going down and when we go down to the door we turned to the right and stepped down on to the ground from the stairs. That is the way we used to go up and down.

Q. Turn to the right or left?

A. Turn to the left.

Q. After you got down to the bottom?

A. Yes, sir.

Q. As I understood you yesterday, you testified that you saw this notice that was posted up by Mr. Borden on the foundation? A. Yes, sir.

Q. Did you read the notice?

A. Yes, I read it.

Q. I now hand you a purported photograph of the

(Testimony of Charles Goodell.)

conditions there as they existed along about February, March and April, 1910, and ask you if that is a correct representation of the situation there at that time in front of the lot and around the lot,—lot 21, Block 2.

A. Yes, that is about the way it was at that time.

(The photograph is admitted in evidence as Defendant's Ex. 19.)

Q. I will ask you if that notice could have been placed anywhere on the foundation of that building without being in the way of the structure which was going to go up.

A. It would have to be placed down on the foundation; that was the only place to fasten it—the only thing that was up at the time.

Q. The new building covered the entire lot?

A. Yes, sir. [113—89]

Cross-examination.

(By Mr. BORYER.)

Q. Do I understand you to say that you were acting as agent for Mr. Borden for this property?

A. Yes, sir.

Q. Were you acting as the agent for Mr. Borden at the time that the foundation was placed or built on this property?

A. I had charge of the work of putting in the foundation for Mr. Borden.

Q. When did you begin that foundation?

A. Well, they had men there shoveling snow first—there was a lot of snow on the ground, 6 or 7 feet of snow. I don't know exactly the date when I

(Testimony of Charles Goodell.)

started to shovel snow, but when I started in to dig out for the foundation, for the mudsills for the posts, that was on the 17th of February.

Q. That was on the 17th of February, 1910?

A. Yes.

Q. Did you work continuously at the construction of this foundation up to and including the 23d day of February, 1910?

A. Yes, I was digging out there and I got through with all that work and had the structure up on the 24th, I completed it. It was nearly done on the night of the 23d but I did a little work on the 24th, completed that part, Mr. Borden's part.

Q. Was there any lumber delivered by the Arctic Lumber Co. on the 23d or 24th of February, that same year?

A. I presume there was. I couldn't tell exactly the dates when the lumber was delivered.

Q. You began the erection of the building on this foundation on the next day, did you?

A. Yes. [114—90]

Q. It was continuous work? A. Yes, sir.

Q. Do you know if anyone else furnished any lumber for the construction of this building other than the Arctic Lumber Company?

A. No, unless Meehan, he built some fixtures. He did that by contract and they furnished the lumber for whatever work he did for the bar, etc.

Q. When you constructed this building, did you make any doors or windows in the rear of the building? A. Yes.

(Testimony of Charles Goodell.)

Q. Did you make any doors on the top or third story of the building, in the rear?

A. Do you mean making the doors or putting in the doors?

Q. Making the opening for the door and putting in the door? A. Yes, I put in the door.

Q. One door on the third floor? A. Yes.

Q. On the second floor or middle floor, did you put a door in the rear of the building? A. Yes, sir.

Q. On the basement floor or the floor that is on a level with the street, did you put a door?

A. Yes.

Q. What would be the use of that door on the third floor unless there was a porch built out from that floor?

A. Well, the idea was, in the first place, when I drew the plans we figured on having a chute from the upstairs to go down, to shoot right down, because you couldn't get into the upstairs only through the drugstore stairs, and they talked about it—talked about building a porch.

Q. They substituted a porch for that? [115—91]

A. Yes, sir.

Q. And then the porch was afterwards built and attached to the house from the third floor?

A. Yes, sir.

Q. There was also another porch built from the second floor or middle floor, was there not?

A. Yes, sir.

Q. That was to take the same place as the chute, for the purpose of having a back entrance?

(Testimony of Charles Goodell.)

A. No, when the second floor was built—that is on a level with the barroom floor—Macaulay put that in for the purpose of having seats out there.

Q. You are speaking of the basement floor. I mean the second story.

A. The second story, on the upstairs?

Q. Yes, the second story.

A. That porch was built—that was done at the request of Mrs. Mattern, the lady that had rented the upstairs.

Q. For what purpose?

A. She used that porch—she had coal out there and flower plants and used to hang her washing there and clothes-line, and used to sit out there in the summer time—summer nights.

Q. The rear of the building has a view of the bay?

A. Yes, sir.

Q. And what would be the object of putting a door on the second floor unless there was a porch put there?

A. Well, there would be different objects of having a door there. You could throw the garbage out, and it was about the only way by which you could ventilate the upstairs from the hallway. There is no ventilation through the roof, and [116—92] you could open the door there and get the air from that direction.

Q. What windows were there?

A. There was no windows in the hallway.

Q. I don't mean the hallway. I am speaking about the second story, which is about 15 or 20 feet

(Testimony of Charles Goodell.)

from the level of the street.

A. Yes; the second story floor is about 15 feet 6 inches from the street—to the level of the second story floor.

Q. When was it that you read this notice that was posted on the property—can you recall?

A. Just immediately after Mr. Borden nailed it up there—I happened to see him go down and nail it up and I wondered what it was. I was putting on the top of the foundation and I saw him on the side nailing it on and I stepped over to see what it was. I suppose I read it two minutes after he had it nailed on.

Q. You stepped over where?

A. To the side of the building where he had the notice posted.

Q. That notice could have been placed on any other portion of the foundation, could it not?

A. Of course.

Q. It could have been placed up near the street, on the foundation there, could it not?

A. Yes, sir.

Q. It would not have been any more in the way than where it was?

A. No, it would not have been any more in the way but it could not be seen as well as where it is.

Q. You mean if the notice was placed up at the point, at the [117—93] front of the house where the material was furnished, that it could not be seen as well as back there?

A. You mean if placed on the structure?

(Testimony of Charles Goodell.)

Q. Yes. A. No, it could not.

Q. Could it have been placed on the lot?

A. The structure covered the whole lot; it had to be placed on the structure. You could stand anywhere on the sidewalk and look over and see that notice. If it had been at the front, on account of the bank, you would have to get right at the railing to look over and see it.

Q. Couldn't it have been put on the rail that came up to the building?

A. There was no rail right in front of the building. There was a rail there, near there, to warn people crossing the sidewalk because the building was dangerous. We put a rail across with a danger sign on both sides to keep people away. It could have been put on the rail over that way but not opposite the building.

Q. That would have been on Borden's property?

A. No; that would have been on the next lot.

Q. To what were these boards nailed?

A. The rail came along there and of course they cut it off there to get an open space and nailed the board on top of that rail, and I don't know whether I put a post or sawhorse there to nail the other end to and put that right across the sidewalk and then took a danger sign and put on there, so that people would go on there, because it was pretty shakey right in front of the building,—the sidewalk was very poorly constructed any way, in the first place.

[118—94]

Q. And then the material that was furnished

(Testimony of Charles Goodell.)

there was shot down under this sidewalk to the basement, as I understand it.

A. Yes, until the time that we got up to the level of the street, we took the stuff down underneath the sidewalk.

Q. Now, then, I understand that in order for you to get down to this basement it was necessary for you to go through somebody else's property?

A. Yes, at the foot of the stairs, in front of the Cordova drugstore.

Q. Property that belonged to Mr. Boyle?

A. Yes, sir.

Q. That was your means of getting down to the basement of this building, was it?

A. That was the easiest way, the quickest way, to get down under the sidewalk. I suppose I went down twenty times a day and I could shoot down quicker going down that way—that would be the easiest way.

Q. What do you mean?

A. I could walk down—shooting the lumber down made the snow hard and slippery, but I walked up and down there quite often. A good many wouldn't do it, probably.

Q. Now, in going down there—there were posts and joists straight across in front of that lot, were there not?

A. On the top over this slide, you mean?

Q. No, I mean on the lot; for instance, the corner of the lot, in the front of the building you placed a post for the foundation, on one corner?

(Testimony of Charles Goodell.)

A. Yes.

Q. How far from that corner did you place another post? A. About ten feet.

Q. And then how far before you got to the other corner? I [119—95] mean straight across.

A. Cross-wise—well, a foot six inch centres—there were three posts across.

Q. That was the first row of your foundation?

A. Yes.

Q. Your second row was how far back?

A. They were, I think, about ten foot centres.

Q. That is from your corner post, facing on First Street and facing the building, you had a row of posts across that lot for 25 feet? A. Yes, sir.

Q. And then your next row of posts for your foundation was ten feet back from that?

A. Yes, about ten feet. I wouldn't say; it would vary.

Q. Approximately ten feet? A. Yes, sir.

Q. And then your third row was approximately ten feet across? A. Yes, sir.

Q. Your fourth, fifth, sixth, seventh, eighth, ninth and tenth rows were approximately the same distances across?

A. Yes, about the same. They might be some of them 12 ft. apart.

Q. After you went from the street and went down this slide or incline down to the basement and had reached the bottom of the basement, could you go out on the sides from the bottom? A. Yes.

Q. How?

(Testimony of Charles Goodell.)

A. Well, here is the drugstore basement, the basement of the drugstore and entrance to the theatre, and I turned to the left and at the corner of their building, underneath the sidewalk, they had this boarded up,—they kept coal in there and one thing and another, and they had a door [120—96] and kept that door open and there were two or three steps.

Q. That belonged to his place? A. Yes, sir.

Q. What I mean is this: In your excavating and the shoveling and clearing away of the snow for your foundation on the side of the building, you threw that dirt and snow out off of your lot and on to the adjoining lot?

A. Yes, we threw some of it out on the other side. There is a kind of creek there and I made a wooden box about four feet wide, a kind of chute, and deposited the snow in that, because it would be in my way for working. I made this chute and shot the snow down to the creek.

Q. Then, as a matter of fact, from the bottom of your basement the snow was then piled up on the outside some six or seven feet?

A. On the far side; yes.

Q. The side that the notice was on?

A. Yes, sir.

Q. And then in order for you to get out of this basement, you would have to climb up or get up over this snow? A. No.

Q. How would you get out?

A. On account of the fill they made in the street;—

(Testimony of Charles Goodell.)

that was filled up with dirt pretty well right under the sidewalk on a slope like that (indicating). You came down here and walked right along on the level here—that was much better—that would bring out about on a level with the snow because there was such a slope in the ground in the hole.

Q. Now, I will ask you if that notice had been posted on the corner post in front of the building, on the right-hand side, at the bottom of this chute, would it have interfered [121—97] with your work? A. No.

Q. It could have been placed so as to face the inside, could it not, and be read from the inside, and not interfere with your work? I mean down in the basement.

A. No, it could not very well be placed so you could read it from the inside, without being in my way, for the simple reason that there was only the foundation posts and sills up here to place it on so you could see it from the inside. It would be in the way of my floor joists and studding and walls and they put the sign below just enough so when I put the wall up it would not be in my way.

Q. You don't get my idea. The notice was placed on what post? What I am trying to see is, if the notice could not have been placed on the foundation in front of the building and in front of the place where it was posted, so it could be read by anyone going on the property of the defendant Borden and if it could not be read from the basement.

A. From the inside of the basement?

(Testimony of Charles Goodell.)

Q. Yes. I will ask you this question. As a matter of fact, in order to read this notice, was it not necessary to go on the property of someone else?

A. Yes.

Q. You couldn't remain on the property or the lot of W. H. Borden and read this notice, could you?

A. Well, it would be possible to do it, but it wouldn't be probable that anyone would read it that way.

Q. How could you do it—how would it be possible to do it after the foundation was completed? The foundation was practically completed on the night of the 23d and fully completed [122—98] on the 24th? A. Yes.

Q. Now, how would it be possible to go on the property of W. H. Borden, this lot upon which the house was built, and read that notice?

A. He would have to go to the edge of the foundation and lean over like that (indicating) and he might read it, or go down underneath and read it.

Q. Wouldn't you have to get down on your stomach?

A. Well, you might do that too—you would have to get down on the floor and lean over, reach over, to read the notice.

Q. And you would have to read it upside down?

A. No, not necessarily.

Q. Why wouldn't you? Place that book in front of you about where the notice is.

A. Suppose it is right there and I am here. If I get back here a little bit and reach over there, I could

(Testimony of Charles Goodell.)

pretty near read it. I would have to do that to read it, because I couldn't read it upside down.

Q. You would have to do an acrobatic stunt in order to read it?

(No answer.)

Q. It could have been placed so as to face on the inside of the foundation, so that it would not interfere with the work, on some of the posts around in there?

A. Well, you couldn't then, because when it was put up there, as a matter of fact there was no inside to it. It was all open then; it was just the sills on there and the joists.

Q. It could have been put on some of those sills or joists in front of the building?

A. It could not have been put on the joists,—it would be covered up in a few hours. [123—99]

Q. How is that?

A. I don't see where you could put it only on the outside somewhere, along the sill there on the outside.

Q. I have reference as to this particular time. I understand that this lumber was delivered on the 24th. Your original contract didn't provide for putting a flooring on?

A. Yes, W. H. Borden furnished the foundation timbers and I think the joists, but the shiplap floor was put down by Macaulay & Palmer.

Q. Now, then, before the flooring was put on—if this notice had been posted on any of those posts or joists or sills along there, it could have been seen by

(Testimony of Charles Goodell.)

the first man that came to deliver lumber, could it not, and could have been gotten to and read?

A. No, the lumberman delivers lumber out in the middle of the street there and never got over to the sidewalk. He wouldn't see it unless he got out to the sidewalk. He could have gone around and looked at it. Coming along the street he would deliver his lumber and go on.

Q. When do I understand you finished your contract, in reference to your contract that has been offered in evidence here?

A. On the night of the 13th of April.

Q. And afterwards completed the work on this building for Macaulay, did you? A. Yes, sir.

Q. I will ask you if you filed a lien for the work that you performed for the construction of this building.

A. I filed a lien for a part of the money; yes.

Q. For a part of the money for the construction of this building? A. Yes. [124—100]

Q. Did you include in that lien items for work performed on the foundation of the building?

A. Well, I don't know. I didn't itemize anything. I had something like \$480 due me on the whole contract.

Q. Was that \$480 due from Macaulay & Palmer alone? A. Yes.

Q. Wasn't a portion of that of the amount due from Borden?

A. No, he paid me in full when I got through with the foundation.

(Testimony of Charles Goodell.)

Q. I will ask you if a part of that amount was not for the extras that you have testified to here?

A. Yes, some of it.

Q. About how much of it?

A. Well, I would have to go home to look over my books to tell you exactly.

Q. Approximately?

A. All the extras I did on that building amounted to probably \$100, something along that—\$110 or \$115 extra work that I hadn't been paid for. Part of that extra work was done during the construction of the building; for instance, the cooler for the beer down in the basement, that was extra, and I did that before I completed the building and that was included in this lien.

Q. And it was work that you had performed upon and about the material that you have testified to as having been sent down by Mr. Stuart?

A. Part of it was.

Q. Was it not the intention to use the first floor where you state that you did this extra work as a wholesale liquor place or establishment, where liquor was sold at wholesale [125—101] and retail?

A. Yes.

Q. That was the intention at first?

A. That is what they used it for.

Q. That is what you were to fix it up for?

A. Yes, sir, for a saloon.

Q. (By the COURT.) Is that the basement?

A. No, the saloon floor.

(Testimony of Charles Goodell.)

Judge LYONS.—The floor on a level with the street?

Mr. BORYER.—I am speaking about the main floor, on a level with the street.

Q. That is the room in which you performed some of this extra service that you spoke of in your direct examination?

A. Yes, that floor, some upstairs and the rear stairway or platform.

Q. Part of your extra work was putting in shelving in this main room? A. Yes.

Q. What were these shelves to be used for?

A. To display the goods, bottle goods, liquors, tobacco, cigars and stuff like that.

Q. Nailed and fastened to the sides of the building, were they not?

A. Yes, they were attached to the building.

Q. And are still in the building? A. No, sir.

Q. By whom were they taken out?

A. By the people in charge of the bankruptcy proceedings. Chapin and Whittemore took them out.

Q. Took the shelving out?

A. Yes, sir. [126—102]

Q. Was the shelving taken out after those people had gone into bankruptcy and the moving picture show went in there?

A. No, they were taken out and removed by Whittemore and Chapin and stored in Ostrander's basement, and I guess they are yet, the shelves and counters.

Q. You have been the agent of that property since

(Testimony of Charles Goodell.)

Palmer & Macaulay left here?

A. Yes, with the exception of the time that Judge Chapin had charge of it for the creditors of the Old Crow Liquor Co.

Q. When did you take charge of it after that? About what month?

A. It was about the first part of March, I should judge, 1911.

Q. For whom did you take charge of it?

A. For Mr. Borden.

Q. Did you collect the rents from it? A. I did.

Q. What rents did you receive from it during the month of March, 1911?

A. Chapin paid me \$75, part of the Old Crow Liquor Co., when they were selling the liquors there. I think he paid me for the month of March \$75.

Q. What did you realize from the upstairs—I mean from the whole building—during the month of March—was that all—\$75?

A. Yes, sir, that was all.

Q. Did you rent it to anyone after March?

A. Yes, I rented it to the Cordova Commercial Co.

Q. For how much? A. \$150 per month.

Q. The whole building? A. Yes. [127—103]

Q. For how many months did they have it?

A. They had a lease on it for two years but they found—it must have been in December, I guess, or January—I guess it was December, I reduced the rent to \$100—they couldn't pay.

Q. December, 1911?

A. I think it was in the month of December, 1911.

(Testimony of Charles Goodell.)

Q. Then there would be nine months, one month that you received \$75 for this building, that was the month of March and the nine months that you received \$150 which would be \$1,350. Now, from December, 1911, you reduced the rent to \$100 approximately that time. In March, 1911, the referee in bankruptcy paid you \$75 for the use of the building?

A. He paid for more than that. They had the building about three months and he paid at the rate of \$75 per month for whatever time they had it.

Q. That was approximately three months?

A. I think so, if I remember right.

Q. That would be, then, \$225? A. Yes.

Q. From March until December, 1911—was the property vacant during that time?

A. No, shortly after Mr. Chapin turned the building over to me I leased it to the Commercial Company and they had it all the time up to—they gave it up on the first day of February, I guess, or the last of March of this year, when they moved out of it.

Q. Did the referee give up the property in March, 1911—was that the last month they had it?

A. Yes, I think so.

Q. And they had paid you approximately \$225 for the rent of [128—104] the building up to that time? A. Yes.

Q. After March 11th did you lease it to the Cordova Commercial Company or to the moving picture man?

A. No, the picture man had been in there before.

(Testimony of Charles Goodell.)

Q. Did the Cordova Commercial Company take it from March, 1911, do you recall?

A. I don't know whether it was March or April they started there. I forget now. I think it was April.

Q. And they kept it from April, 1911, to December, 1911, at the rate of \$150 per month?

A. Yes; I wouldn't say the dates exactly. I can't remember that. I would have to look it up, but about that.

Q. That would make nine months, \$1200 for rent during that time—eight months, I mean.

A. Yes.

Q. From December, 1911, it was rented to the same parties at \$100 per month? A. Yes.

Q. Up to and including April, 1912?

A. No, they paid no rent for April. I think the last month they paid for was February.

Q. That would be January and February, \$200?

A. Yes; it may be that they only paid \$100 for the month of December too. I couldn't tell without my books.

Q. Now, in regard to this lease. Did you ever take any steps, legal proceedings, to forfeit this lease, this lease or contract existing between Borden and Macaulay? A. I put a lien on the building.

Q. You put your lien on the building?

A. Yes, sir. [129—105]

Judge LYONS.—We object to this. It is irrelevant.

By the COURT.—It will be stricken as not respon-

(Testimony of Charles Goodell.)

sive to the question.

Q. I will ask you if you ever took any legal proceedings on behalf of Mr. Borden to forfeit or to declare null and void the contract of lease existing between Borden and Macaulay.

A. No, I took no legal proceedings. Mr. Chapin, who was referee, had charge of the building at the time. I told him that I was not getting any ground rent, was not getting any rent out of the building or anything, and asked him what he intended to do about it, and he said he would think the matter over and see what he could do, and a few days afterwards he turned the building over to me without any legal proceedings of any kind—just talked it over, and he concluded that he had no right to hold the building on the part of the creditors of the Old Crow Liquor Company, so he just turned it over to me and paid me the rent.

Q. Did you ever make any demand on or request of Macaulay & Palmer for the rent of the building?

A. I did not, because they had left the country and I did not know where they were.

Q. Did you ever write them regarding the rent, send them a bill?

A. No, I didn't know where they were.

Q. Did you ever try to find out where they were?

A. No; I asked about them sometimes from people coming in from the outside, if they had seen either one of them, and no one seemed to know, and I was not taking any particular interest in that part of it because I thought Mr. Borden would probably look

(Testimony of Charles Goodell.)

after that himself. [130—106]

Q. Had he instructed you to send them any bill?

A. No, he had not.

Q. Had he instructed you to take the property over?

A. Well, yes; he instructed me to go to Chapin and ask him what he intended to do and what he would do.

Q. He didn't tell you to go to Macauley & Palmer or send any bill to them?

A. No, he knew I didn't know where they were.

Q. You have been renting that property ever since, have you? A. Yes.

Q. And are still the agent for it?

A. Yes. Of course, it is not rented now. Only that one family that lives upstairs—the rest of the building is vacant.

Q. The contract you had with them for the purpose of constructing this building calls for plans and specifications. Where are those plans and specifications?

A. Well, I don't know where they are now. I had the plans and when I was through with the building I had no further use for them. I looked for them but I couldn't find them.

Q. Your plans and specifications called for a building in the rough,—putting up a building in the rough? A. Fininshed as it is now.

Q. Were you to do the plastering?

A. Well, no, I was not to do the plastering, but they hired me to look after it and let the contract for

(Testimony of Charles Goodell.)

it—look after the plastering and superintend it.

Q. Your contract didn't call for the doing of the plastering? A. No.

Q. With whom was that contract made?

A. With Swanson.

Q. Who made that contract with Swanson?
[131—107]

A. I guess I did the dickering with him and there was another plasterer here. I forget his name now. They saw him about it and figured with him. Macaulay requested me to attend to that part of it for him which I did.

Q. And you didn't have a contract for the putting in of the plumbing, did you? A. No.

Q. Who had that contract? A. Feldman.

Q. The gentleman who was on the stand yesterday? A. Yes.

Q. With whom was that contract made? Who put this plumbing in?

A. Mr. Elliott did the work for Feldman.

Q. With whom did Feldman have his contract for the work? A. With Macaulay.

Q. Who made the arrangements—you or Macaulay?

A. Macaulay made the arrangements with Feldman, that is, the amount of work and the plans for it, but laying it out, I did all that. I had it all in my plans, how it should be made, and I laid it out for Elliott, the man that actually did the work. I helped him also around the building.

Q. Was that in your original plans and specifica-

(Testimony of Charles Goodell.)

tions? A. No, it was not in my contract.

Q. I mean in the plans and specifications—was that shown on your plans and specifications?

A. Yes, it showed the plumbing, the wash-basins and everything showed. There were changes made after we got the partitions all set and everything. We probably made some changes in some of the wash-stands, moved them to more convenient places in the rooms, but it was shown in the plans all right.

[132—108]

Q. On your original plans?

A. On the plans that Elliott worked by; yes, sir.

Q. And that was on the plans and specifications which were attached to your contract?

A. Well, I drew the plans and the contract was there—they were not attached together; they belonged to the same plans we worked by and finished by.

Q. Your plans and specifications showed where the wash-basins, etc., were to be placed?

A. Yes.

Q. And where the radiators were to be set?

A. No, no radiators.

Q. It didn't provide for the radiators?

A. No, there was no radiators. It didn't provide for any steam-heating plant.

Q. Your plans and specifications did not?

A. No; for the reason that I didn't think it was the intention to install any steam-heating plant at that time. That was to be a consideration to come in later on. They didn't intend to put in any heat-

(Testimony of Charles Goodell.)

ing plant right then.

Q. Right when?

A. At the time the building was constructed. They thought they would probably do that later on.

Q. What do you mean by later on?

A. Well, whenever money, finances, would allow it, I think.

Q. Where were they going to put it then—where did you talk about putting it? Did you talk it over with Macaulay & Palmer and Borden?

A. In a way we did, too. Of course we talked about a good many things. [133—109]

Q. About this particular thing, though?

A. We talked at one time about putting the boiler right down underneath the basement. They excavated under there. There is plenty of room there now—take out all the muck, put down a solid foundation and put the boiler in.

Q. And was that Borden's idea or Macaulay's idea? A. That was Macaulay's.

Q. What did Borden have to say about that—was that suitable to him, that point?

A. I can't recall that I ever discussed the subject with Borden about the steam-heating plant, only he said that Macaulay had agreed he would put in a steam-heating plant at some future time, otherwise I don't think we discussed it, that I can recall.

Q. I will ask you if you ever foreclosed your lien?

A. No, sir.

Q. By whom was that paid? A. Mr. Borden.

Q. Has the building ever been painted?

(Testimony of Charles Goodell.)

A. You mean inside or outside?

Q. Outside.

A. Why, the front has been painted; yes.

Q. The sides and rear have never been painted?

A. No.

Q. Has the inside been painted? A. Yes.

Mr. BORYER.—Do I understand from the defendants that they admit that all of the lumber and building material furnished by the Arctic Lumber Company, beginning on the 23d day of February, 1910, to and including the 13th day of April, 1910, [134—110] was furnished by the Arctic Lumber Co. and was delivered to and used in the building in question—taken to the building at the request of Mr. Macaulay and used in the building? These are the bills that have been receipted for by Mr. Goodall as having been received and which were checked yesterday?

Judge LYONS.—I think so.

Q. I will ask you if at the time when you began the construction of this building after the foundation had been completed, if Borden was around there daily during the early part of the construction of the building. A. Yes, he was around often.

Q. Daily?

A. Pretty near every day, yes, in fact, I think every day.

Q. He saw the lumber delivered and the building progress? A. Yes, sir.

Q. I hand you Plaintiff's Exhibit "F" for a bill of lumber on April 21, 1910, and ask you for what

(Testimony of Charles Goodell.)

you used that lumber in this particular building, as you recall.

A. Well, I can mention several places where I used 2x4. I couldn't tell you exactly. I used 2x4 for the frame of counters I built and I used 2x4 for racks down in the liquor-room, in the basement, and also some shelving in the liquor-room down there, for the frame—used 2x4 there. It was used for work of that kind.

Q. I hand you Plaintiff's Exhibit "G" for a bill of lumber on April 25, 1910, and ask you what you used that for as you remember it.

A. Well, I should judge that part of this bill was used for that first platform in the rear of the building. [135—111]

Q. The first platform extending back?

A. Yes, that is level with the basement floor.

Q. I hand you Plaintiff's Exhibit "H" for a bill of lumber furnished on April 25, 1910, and ask you what you used that lumber for in that building.

A. Well, that is part of the lumber that was used for the stairway in the rear, the stepping and the stringers.

Q. I hand you a paper marked Plaintiff's Exhibit "I" for a bill of lumber on April 26, 1910, and ask you what that lumber was used for in that building?

A. That is more stepping.

Q. Used for stepping?

A. Yes, sir, the same thing.

Q. I hand you Plaintiff's Exhibit "J" for a bill of lumber under date of April 30, 1910, and ask you

(Testimony of Charles Goodell.)

what you used that material for in that building.

A. Well, I couldn't tell exactly the place that was used, but it was used for some extra work.

Q. You don't recall just exactly what it was used for?

A. It was used for some extra work around there. I don't know just exactly what that was.

Q. I hand you Plaintiff's Exhibit "K" for a bill of lumber furnished on May 20, 1910, and ask you what you used that lumber for in that building.

A. That has been used for the shelving.

Q. I hand you a paper marked Plaintiff's Exhibit "L," dated May 20, 1910, in pencil, and ask you what you know of that bill for \$1.75 for millwork by Meehan.

A. He did some turning there for the posts that were used in the shelves and he also did a little more work when we moved [136—112] that office from the front to the rear. I enlarged the office and I had him get out a couple of window sashes with some machines down there. It may be either one of these two jobs.

Q. Enlarged the office for what purpose?

A. The office was movable, made in sections. It was right up in the front, back of the show window as originally built, and when he made the alteration in the show window, he had to remove that office back to the rear of the barroom and he concluded he wanted it enlarged at the same time with a couple of sections and Meehan made the sash for it.

Q. By show windows, you mean display windows

(Testimony of Charles Goodell.)

for his goods? A. Yes, the plate glass.

Q. I hand you Plaintiff's Exhibit "M" for a bill of lumber under date of June 1, 1910, and ask you what you used that lumber for in that particular building.

A. That was used in the alteration of the show window—all of it; that stairway there that was for a cap for the window.

Q. Do I understand that this display window or show window was in the front of the building?

A. Yes, the front window there.

Q. What work did you do in order to make that window so that it could be used as a show window?

A. Well, it was originally moulded up, right up to the ceiling. Here is the window. Looking at it from the sidewalk it is about, I should judge, 3½ feet wide that way and back on a level with the bottom of the glass like that, for bottles, and back of there it was boarded up, right up to the ceiling and a door fitted in very close, so as to get in with the bottles. Of course that kinder shut the light out from the barroom and Macaulay concluded to change it, have [137—113] it open so they could look right in, and I took all of that out and took 2x2 and put them far enough apart so people couldn't put their hands in. The pickets were made out of 2x2. They were about 4½ feet long, I guess, and on the top I put a stairway, with a cap on top of these pickets and left one section loose so they could get in.

Q. When did you put this show window in there—

(Testimony of Charles Goodell.)

first, was that under your original contract?

A. Yes.

Q. And the reason you changed it was because it was not practicable and it shut out the light from the room and you changed it for that reason?

A. Yes, it shut out the light and Macaulay concluded to change it.

Q. I hand you Plaintiff's Exhibit "N," a bill for lumber under date of June 2, 1910, and ask you what portion of that building that material was used in?

A. That was used for the shelving in the wholesale department—on that side of the building. He had his wholesale part enlarged, extending the shelving—that included the shelving.

Q. Where had he been keeping his stock before that?

A. He had some shelves there before and the rest of the stock he kept down in a little room downstairs in the basement.

Q. I hand you Plaintiff's Exhibit "O" for a bill of lumber under date of June 2, 1910, and ask you what portion of the building that was used in.

A. This was used for making additional sections for enlarging the office when I moved it.

Q. When you moved the office?

A. When I moved the office from the front of the building.

Q. I hand you Plaintiff's Exhibit "P" for a bill of lumber and [138—114] material furnished on June 3, 1919, and ask you what portion of the building that was used in?

(Testimony of Charles Goodell.)

A. Well, this was used for the same purpose—there might possibly some of it be used on the shelves, but I think all of it was used for the office.

Q. I hand you Plaintiff's Exhibit "Q" for a bill of lumber dated June 4, 1910, and ask you where that material was used in the building?

A. I couldn't tell you exactly, but I think it was used for the same purpose, the same job.

Q. I hand you Plaintiff's Exhibit "R" for a bill of lumber dated June 10, 1910, and ask you for what purpose that was used in the building.

A. That was used for a counter, for a short *cluner*.

Q. In what portion of the building?

A. In the wholesale department, on that side.

Q. I hand you Plaintiff's Exhibit "S" for a bill of lumber dated July 8, 1910, for 24 linear feet of quarter-round and ask you in what portion of the building that material was used.

A. That I don't know.

Q. Do you know if you received that or not?

A. As I stated yesterday—

Q. Answer the question.

A. I think I saw some quarter-round in the basement. I don't know that that is the piece.

Q. Are you acquainted with Mr. Macaulay's signature?

A. Fairly well, yes—I have seen it a number of times.

Q. I will ask you if that is not Macaulay's signature on the receipt for the delivery of that material, in your opinion.

(Testimony of Charles Goodell.)

A. I wouldn't like to pass an opinion on that. I couldn't say [139—115] from that. That is written very dull and don't show up very plain. I couldn't say, but it looks very much like his writing.

Q. Would you swear that that 24 cts. worth of quarter-round was not delivered to the building?

A. No, sir.

Q. Would you swear that that particular quarter-round was not used in the building? A. No, sir.

Q. I hand you Plaintiff's Exhibit "T" for a bill of lumber under date of August 6, 1910, and ask you for what purpose and in what portion of that building that material was used. A. I don't know.

Q. I will ask you if in your opinion the receipt for the delivery of that lumber signed Norman Macaulay, if in your judgment that is his signature?

A. Well, I believe it is.

Q. I will ask you if you will swear that that material was not delivered to and used in the building—that particular material in that exhibit.

A. Well, I couldn't swear to nothing of the kind.

Q. You don't know, in the first place, whether it was delivered and you don't know if it was used—is that the position you take?

A. I can give you my belief in the matter.

Q. Do you know? A. No, I do not.

Q. You don't know if it was delivered?

A. No, I don't know.

Q. Do you know if it was ordered?

A. I don't know. [140—116]

Q. Do you know if it was used?

(Testimony of Charles Goodell.)

A. I don't know.

AFTERNOON SESSION.

Q. I hand you Defendant's Exhibit 19 and ask you if that picture shows the sidewalk that you testified to as having been in a dangerous condition.

A. Yes,—of course it don't exactly show how dangerous it was, in the picture.

Q. It shows that it was swayed in towards the building? A. Yes.

Q. And was it in that condition at the time when you began the construction of that building?

A. Well, the sidewalk was badly swayed down and it was leaning.

Q. Leaning toward the building?

A. Yes, leaning toward the building.

Q. Was that sidewalk removed before you put the building up?

A. Well, it was partly removed.

Q. Who removed it?

A. I did when I was building—tore the planks out.

Q. You tore the planks out?

A. Yes, it was in my way.

Q. Protruding over where you wanted to put your building?

A. Yes, they did. I sawed the projection off first, sawed the end of the planks off.

Q. They projected over the lot?

A. Yes, some of the planks stuck out over on to the lot.

Q. And do you recall when you sawed those off?

A. I couldn't tell you exactly the day.

(Testimony of Charles Goodell.)

Q. About how many did you saw off?

A. I don't know. I remember sawing them off. I had the [141—117] street line and I plumbed down for my foundation, so as to get the line and the planks being out. I don't know how many. I sawed them off, so I could drop my plumb line down and get my line.

(By Judge LYONS.)

Q. When did Macaulay & Palmer leave the building?

A. I couldn't say the date, but I think Palmer left the latter part of August, the middle of the month probably, somewhere along there, I couldn't tell, and Macaulay left probably two or three weeks later. I couldn't tell exactly.

Q. Have they paid any rent for that building since that time? A. No.

Q. Have they ever offered to take possession of the property since that time? A. No.

Q. Who were the successors of Macaulay & Palmer in the building?

A. Well, their creditors, the Old Crow Liquor Co., instituted proceedings. I think Judge Chapin was the referee and he took charge of everything.

Q. What was he referee in?

A. In that bankruptcy proceeding, I think the marshal, Brightwell, had charge of the building for a week or two.

Q. Was it attached before the bankruptcy proceedings were instituted? A. Yes.

Q. Who was the Old Crow Liquor Company—who

(Testimony of Charles Goodell.)

were the persons composing that company?

A. The only thing I know is what Macaulay told me and Palmer. That is all I know. [142—118]

Q. Mr. Boryer examined you at some length on the lumber that was furnished you after the 14th day of April, 1910, by the Arctic Lumber Company. I will ask you if you were paid extra for that work or otherwise. A. I was paid extra for it.

Q. Was that any part of the original contract which you had with Macaulay & Palmer?

A. No, sir.

Q. It was not? A. No, sir.

Q. Who owned the next lot to this building?

A. Leach, I believe.

Q. Is there any building on that lot?

A. You mean the lot on that side (indicating)? That belongs to Leach—there is no building on it.

Q. Was there a building at the time you put up this building? A. No, sir.

Q. I will ask you if in your opinion there is any more conspicuous place on that lot for posting that notice than the place at which it was posted.

A. Well, I can't think of any on that place at that time.

Q. If it were posted on the front end of the lot toward First Street, would that be a conspicuous place?

A. I don't consider it would be as much so as it is where it is.

Q. Could it have been posted on any of those posts on that foundation on the front part of the lot and

(Testimony of Charles Goodell.)

be seen? A. No, it would be below the snow.

Q. About how many feet of snow was there under that notice at the time you first saw it?

A. Well, I should judge at least 4 feet—possibly 5 ft.

Q. Mr. Boryer examined you at some length about the lien that [143—119] you filed against the same property. Do you know when you filed that lien—do you remember?

A. On the tenth of June.

Q. How long was that after you had completed the building?

A. About fifty days. You can figure it out. I completed it on the 13th of April and filed the lien on the tenth of June—about fifty days, I guess.

Q. Who is in possession of that property now?

A. Mr. Borden.

Q. How long has he been in possession of it?

A. Since I think March, 1911.

Q. And who was in possession of it between the time that Macaulay & Palmer left and the time that Mr. Borden came into possession of it?

A. Judge Chapin and Mr. Whittemore as referee and receiver of the bankruptcy proceedings. There was about a month Mr. Woods was in there, had a picture show in there. He was in possession of it for about a month, maybe a little more.

Q. Whom did he rent the property from?

A. Mr. Chapin.

Q. That is the referee in bankruptcy? A. Yes.

Q. What about this cedar finish—when was that

(Testimony of Charles Goodell.)

put on, on the side next to Leach's lot?

A. It was never put on.

Q. Never any put on? A. No.

Q. Was that any part of the original contract?

A. No.

Q. Now, there has been some testimony brought out here about [144—120] a skating rink in the basement. Was that any part of the original contract? I mean the contract you had with Macaulay & Palmer. Was that any part of your original contract with them?

A. Only to this extent: In constructing the lower part of the building I could do it in such a way as to make that change any time they wanted to, later on, and framed that part of the building with that end in view.

Q. Was there any time fixed when that work was to be done?

A. No, it was only a frame—the lower wall—in such a way that they could get at it, take it down, and when Leach would build on the adjoining lot, then they would use the two basements as one for a skating rink.

(By Mr. BORYER.)

Q. When was this cedar finish put on the side?

A. There wasn't any—there never was any put on there.

Q. The side of the building—there was some kind of siding put on there?

A. Yes, it was covered even with the roof. We covered that with rubberoid paper.

(Testimony of Charles Goodell.)

Q. When was that done?

A. It was done in either—just about the time when the Cordova Commercial Company went in there. That was March or April, 1911.

Q. Had you had any conversation or talk with Macaulay before that regarding the siding that was to be put on that side?

A. I spoke to him about it at the time I drew the plans, before I started in, and I estimated the material necessary. I told him what it would be to cover the shiplap with cedar siding, and after some talk he concluded that he would [145—121] put that off until some time later on and get along the best he could until he could see his way clear to do it. He didn't want to go in debt any more than he could help.

Q. (By Judge LYONS.) When was that?

A. That was at the time I was drawing the plans and making the estimates and we talked about it afterwards, and rain-storms driving against the side at times, but he said he would do it some other time if he could.

Q. Why did you think that should be put on there?

A. Well, the shiplap is not a good covering—you can't make shiplap perfectly tight and on any good building. It should have a covering of some kind, other than shiplap.

Q. It would be necessary? A. Yes, sir.

Q. And it is usual and customary to do that as far as the side of the building and back of the building is concerned, here in Cordova?

(Testimony of Charles Goodell.)

A. It has generally always been an after consideration.

Q. That is the side that is exposed to the weather?

A. Yes, sir.

Q. And is it not necessary for keeping the water out?

A. It is, certainly—in the way of caution.

Q. Who paid the rent up to the time that Whittemore and Chapin took possession of this building?

A. Well, up until the time that Macaulay left here he paid the rent.

Q. He left here what month?

A. The latter part of August, I think, or possibly the first of September.

Q. Who paid the September rent? [146—122]

A. I think that Jimmy Smith paid the September rent, if my recollection is right.

Q. Who paid the October rent?

A. I think that Smith paid that too.

Q. And the November rent?

A. There was one or two months there or more that no one paid it. Jimmy Smith refused to pay any longer and no one paid.

Q. When was the possession turned over to Mr. Whittemore and Judge Chapin?

A. I don't remember.

Q. About when, do you recall?

A. It might have been somewhere along the first of the year, I guess.

Q. Some time along in January? A. Yes, sir.

Q. Who turned the possession over to them?

(Testimony of Charles Goodell.)

A. I believe the Court. Judge Cushman, I think.

Q. Turned possession of the building over to them?

A. I think he appointed Judge Chapin referee, if I understand it right.

Q. He was appointed referee? A. Yes.

Q. Do you know if the order of the Court provided for the turning of the possession of that property over to the referee? A. I don't know.

Q. Who turned the keys over to Whittemore and Chapin?

A. Well, I assume the marshal did. When he attached the goods that were in there I think he had the key.

Q. Who turned the key over to the marshal at the time of the attachment? [147—123]

A. I don't know. I think, though, that Tony Mack did. He was the bartender representing Macaulay, running the bar. I think he had the key and I presume turned it over to the marshal, but I don't know that.

Q. At the time of the attachment Macaulay was still conducting his business in there? A. No.

Q. Who was Tony Mack? Wasn't he in there for Macaulay?

A. Yes, the stuff wasn't attached until some little time after Macaulay went out, I believe, at least it wasn't closed up. I don't know how long after he ran the place. Tony Mack ran the place for Macaulay, had charge of it, and when he left there, I think the marshal took charge of it.

Q. Did you ever make a demand on Tony Mack

(Testimony of Charles Goodell.)

for the rent? A. Yes, sir.

Q. Did he pay the rent?

A. No, he referred me to Jimmy Smith.

Q. Did Jimmy Smith pay the rent?

A. He paid it, I think, two months.

Q. Then after the two months, did you ever make a demand on Smith for the other rent?

A. Yes.

Q. What did he do?

A. He said he thought he would confer with his attorney first and told me to wait a few days, so I met him a few days later on, and he said he concluded he wouldn't pay any more rent and so I didn't get it.

Q. Did you then go to Tony Mack, who was representing them?

A. He had left here before that.

Q. Were the doors closed? [148—124]

A. Yes, the stuff was in there. It was in the marshal's possession or the referee, I forget which. The authorities had charge, any way.

Q. When you have been speaking of the building being completed as per the original contract, you have meant the contract you had with Macaulay & Palmer, have you not? A. Yes.

Q. Now, if this notice had been posted in what we term the basement or foundation on some of the joists or upright posts in the building, in the basement, don't you think that that notice could have been seen and read more easily than at the point where it was placed?

(Testimony of Charles Goodell.)

A. If it had been posted where?

Q. On some of the posts of the foundation that supports the building. I understand that across the lot you had three posts, one in each corner and one in the centre. A. Yes.

Q. And then your next row of posts was about ten feet back towards the rear in which you had three other posts, that correspond with the faces?

A. Yes.

Q. Now, if this notice had been posted or placed on one of these posts, on the inside, don't you think it could have been read and seen?

A. It might have been read and seen but not as well as where it is.

Q. In order to read the other notice, where it was, you had to get on to somebody else's property first, did you not, or go through the procedure you described here this morning in order to read it, and then would have to read it upside [149—125] down, would you not?

A. Yes,—the way I think most people would do if they wanted to read that would be to go down the stairs we used for going down and go down the side of the building and stand in front of it.

Q. Before you read it, did you know it was a trespass notice or what?

A. Well, I didn't know what it was until I saw Borden nailing it up there and then I went over and read it.

Q. Went on the outside of the building, on to somebody else's property, and read the notice?

(Testimony of Charles Goodell.)

A. I think when he was nailing it up I was standing on top of the frame and walked over to the edge, and the snow was in front of me and I just got down on the snow, jumped down on the snow, got up to it and read it.

Q. If that notice had been placed on one of these posts of the foundation, could you have walked up and read it?

A. I would have to go down and get down on the other side to read it.

Q. It would be on the inside lines of the foundation, the interior lines of the foundation, if you put it on the other side of the post and faced it in?

A. It would have been underneath the building and no one could have seen it unless they went under the structure.

Q. In going into the foundation or into the building they could have seen it, could they not?

A. I don't know. You see, the foundation post is up at the front, at the sidewalk—the top of the foundation posts and the top of the sill was pretty near even with the top of the ground, and because of the slope of the hill there, there was a trench dug and the post was stuck down in there [150—126] and the first post was even with the ground, and if you nailed it on the side of those posts, it would have been so low down the snow would have obstructed the view and you would not have been able to see it.

Q. After you had completed your foundation if you had put your notice up on a stick and nailed it to one of those joists or posts, don't you think any-

(Testimony of Charles Goodell.)

body and everybody could have seen it?

A. You could have made a special frame for it and stuck it out some way.

Q. And you could have stuck it anywhere on the foundation of the building? A. Yes.

Q. You could have stuck it in the centre of it or in the sills running across the face of the lot?

A. The sills run fore and aft.

Q. Is there not a joist running across?

A. Yes, sir, that is on the top.

Q. Couldn't you put it there on a stick?

A. You couldn't leave it there. I was laying the floor there.

Q. As I understand it, your contract with Palmer was to begin on that foundation first by placing a floor on it? A. Yes.

Q. What would have prevented you at the time you completed your foundation for Borden of taking this notice, attaching it to a stick of timber, and attaching that stick of timber to any of the joists and sills that were on the property? I will ask you if that could not have been done.

A. Certainly, it could have been done.

Q. And everybody could have seen it then? [151—127] A. Yes.

Q. Everybody could have read it?

A. They would have to get down there to read it. They couldn't read it then from the sidewalk. It is 17 feet from the top of the sidewalk to that floor, and of course they couldn't read it that distance. They would have to get down there.

(Testimony of Charles Goodell.)

Q. It would have been on the foundation?

A. Yes.

Q. Were these planks sawed off for the purpose of putting in the foundation or for the purpose of constructing the house?

A. You mean the sidewalk planks?

Q. Yes.

A. They were sticking out there, ragged ends sticking out, and they were in my way for a plumb. I had to put the stakes on a line with the street. I had to work on that to get my line or face of the building and put the plumb down from the top of the sidewalk to the first post, the foundation post.

Q. About how far back from the front of the building is this notice posted?

A. I couldn't say just now; probably 40 or 50 feet, 40 or 45, something along there. I don't know exactly.

Q. As a matter of fact, that could have been tacked right on the sidewalk there, on the fence, on the railing that runs along there?

A. It could have been, off on the next lot. There was no railing right in the front where I was working. I had taken that all out.

Q. You had taken the railing out yourself?

A. Yes, right in front of this lot. [152—128]

Q. Could you have tacked it on the sidewalk and let it stick up in front,—on the edge of the sidewalk?

A. Well, I sawed it off.

Q. Before you sawed it off, it could have been put on there?

(Testimony of Charles Goodell.)

A. A little further over, opposite the next lot; yes.

Q. After it was sawed off, it could have been tacked on there also, could it not?

A. It might have been tacked on the sidewalk.

Q. And that was the point where the delivery of all the lumber that went into that building was made, in front of the building?

A. Yes, out in the street.

Q. It could not have been made at any other place—the delivery of the lumber? A. No, sir.

Mr. BORYER.—That is all.

Witness excused. [153—129]

[**Testimony of W. B. Harris, for Defendant.**]

W. B. HARRIS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. Where do you reside? A. Cordova.

Q. How long have you lived in Cordova?

A. About five years.

Q. Continuously? A. Continuously.

Q. What is your occupation?

A. Prospector and miner.

Q. Were you in Cordova in the latter part of February, 1910? A. Yes, sir.

Q. Can you remember the construction of a building over here known as the Old Crow or Borden building? A. Yes, sir.

Q. And the construction of the foundation just before the building started up? A. I do.

(Testimony of W. B. Harris.)

Q. Did you about that time see any kind of a notice posted on any part of that building or foundation?

A. I did.

Q. State the circumstances under which you saw it first.

A. Borden came to me and asked me to go down with him to see it. He said possibly he might want me as a witness some day, and wanted me to go down and see the notice.

Q. Did you go down? A. I did.

Q. How did you get down there?

A. Went down through the stairs at the old theatre there, under [154—130] the sidewalk, and crossed over along the foundation—crossed over around the other side of the foundation and went and read the notice.

Q. Did you read the notice? A. I did.

Q. Did you notice the date on it?

A. It was the 24th of February.

Q. Did you notice at the time whether or not that was the correct date?

A. Yes, I know that was the correct date.

Q. Where did you stand when you read that notice? A. Right in front of it.

Q. How high was the notice?

A. Why, it was just about four feet high, I should judge, from where we were standing. We were standing on the snow at the time.

Q. Was it above your head or below?

A. It was up about on a level with my face.

Q. About on a level with your eyes?

(Testimony of W. B. Harris.)

A. Yes, sir.

Q. You were standing on the snow?

A. I was standing on the snow; yes.

Q. About what depth of snow was on the ground at that particular spot?

A. I should judge probably 3 feet where we were standing.

(By Mr. BORYER.)

Q. That was the 24th of February of what year?

A. 1910.

Q. Did you make any notation at that time as to the date? A. Yes, sir.

Q. You made a memorandum of it?

A. Why, I went to Hinchinbrook the next day and started to [155—131] build a cabin. I made a memorandum of that, so I know—on some ground I had.

Witness excused.

[Testimony of Abraham Courtright, for Defendant.]

ABRAHAM COURTRIGHT.

(By Mr. RITCHIE.)

Q. Where do you reside? A. Cordova.

Q. How long have you lived here?

A. Permanently about three years.

Q. What has been your business?

A. Merchant.

Q. With what business house are you connected?

A. Cordova Commercial Company.

Q. Did that company at any time you were connected with it occupy the Borden building, the Old

(Testimony of Abraham Courtright.)

Crow building on First Avenue? A. They did.

Q. When was that?

A. Some time along about the latter part of March. I think we leased it the first of April, 1911.

Q. Were you ever in the basement of that building? A. Yes, sir.

Q. More than once? A. Yes, many times.

Q. Did you ever see in that basement any loose common lumber, about 1x12 lumber of any length?

A. When we first moved into the building, I saw some lumber.

Q. State where it was and how much.

A. I think it was back in one of the corners, piled in one of the corners. [156—132]

Q. Toward the front of the building?

A. Toward the rear of the building. It was what we call rough. As I remember, probably 6 or 7 or 6 boards. I have a distinct recollection of using six of them. There was one or two we did not use.

Q. What became of those boards or any of them?

A. I don't remember what became of them. We used them moving—four of them we used for side-walks in piling stuff and one of them for a skid for the stairway, down the stairs, and another one for a bridge over First Avenue.

Q. Do you know what finally became of those boards, or any of them? A. I don't know; no.

Q. Did you ever see any pieces of quarter-round in the basement?

A. There was one piece of quarter-round in the basement I seen.

(Testimony of Abraham Courtright.)

Q. How much was it.

A. I should judge something like—

Q. How long did it stay there?

A. I couldn't say exactly. I took it out of the basement some time the latter part of the summer.

Q. What did you do with it?

A. I used part of it for a curtain pole.

Q. What became of the rest of it?

A. I couldn't say.

(By Mr. BORYER.)

Q. Do you know who delivered that lumber there?

A. I did not.

Q. Do you know anything about the ownership of it?

A. I do not, only I supposed it belonged to the building.

Q. Do you know? [157—133]

A. I do not. Mr. Goodall told me—he told us it was in the basement, something to that effect. I don't remember the words he used.

Q. Did he tell you it belonged to the building?

A. I wouldn't say he did.

Q. Did he tell you it was in the basement?

A. He didn't tell us it was in the basement, but it was in the basement. I think he said—I don't remember the remark he used. It was piled up in the corner of the basement.

Q. How did he come to tell you about it?

A. We asked him about it. I don't know how the conversation came up. There was some lumber down there and he said that was some of the left-

(Testimony of Abraham Courtright.)

over lumber in the construction of the building.

Q. What did he tell you to do with it?

A. Nothing.

Q. Did he tell you to use it? A. Yes.

Q. About the quarter-round—do you know who put that there? A. I do not.

Q. Do you know if it had ever been used?

A. I don't think it had been used until I used it.

Q. Do you know?

A. I am practically certain; it looked like a new piece.

Q. How did you come to use it?

A. I needed a little piece of lumber for a curtain pole, and that seemed to be the handiest.

Q. Did anybody tell you to use it? A. No.

Q. You won't swear it had not been used? [158—134]

A. Only that there was no nail holes or anything in it.

Q. Will you swear it had or had not been used?

A. I don't understand.

Q. Are you willing to swear now that this piece of quarter-round was used or was never used in that building?

A. Well, I am willing to swear that the quarter-round had no nail holes or anything in it; therefore I don't imagine it had ever been used.

Q. Will you answer the question?

A. That is as far as I can answer. There was no nail holes or any signs of usage on it.

Witness excused.

[Testimony of P. L. Simpson, for Defendant.]

P. L. SIMPSON, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. Where do you reside?

A. Cordova, on First Street.

Q. How long have you lived in Cordova?

A. Four years.

Q. In the old town?

A. Yes, when the new town started.

Q. Have you lived here continuously?

A. Yes, sir. [159—135]

Q. What is your business? A. Saloon.

Q. Were you in Cordova at the time that the foundation went in for the Old Crow or Borden building and the building on top of it?

A. Yes, sir.

Q. Did you about that time see any kind of a notice, that looked like a posted notice, for the purposes of that building or any part of it?

A. I saw one on the foundation.

Q. About what time did you see that?

A. It was during the construction of the building. I don't know just exactly what time.

Q. Could you fix approximately the length of time after the foundation went in? A. No, I could not.

Q. How did you come to see that?

A. I noticed it one day. I was standing there talking to Norman Macaulay.

Q. Where were you standing?

(Testimony of P. L. Simpson.)

A. Standing on the sidewalk, where they were delivering lumber.

Q. Was the notice easily visible?

A. Well, it was visible, yes. You could see it from the sidewalk. I don't know what was on the notice.

Q. But you could see the notice? A. Yes, sir.

Q. Did you notice it after that? A. Yes.

Q. Could it be easily seen from the sidewalk?

A. Yes, it could be easily seen from the sidewalk.

[160—136]

Q. Do you regard it as being in a conspicuous place?

A. Well, you could see it any time you walked past there.

Q. Anybody looking for notices could easily see that? A. Yes, I imagine they could.

(By Mr. BORYER.)

Q. Could you read it?

A. No, sir, I never read it.

Q. Do you know whether it was a trespass notice or any other kind of a notice?

A. No, not a thing in the world. I don't know what was on it.

Q. How did it come you didn't read it?

A. I didn't go down there.

Q. About how far was it from the edge of the building, from the front of the building?

A. I should judge it was about halfway between the front and back of the building, probably a little closer to the front than the back.

Witness excused. [161—137]

[Testimony of John Johnson, for Defendant.]

JOHN JOHNSON, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. Where do you reside? A. Cordova.

Q. How long have you lived in Cordova?

A. Four years, I guess.

Q. Were you living in Cordova in February and March, 1910? A. Yes, sir.

Q. What is your business? A. Carpenter.

Q. What were you doing in February and March, 1910? A. I was working with Charley Goodall.

Q. Where? A. At the Borden building.

Q. Did you work on the foundation?

A. I did.

Q. Did you work on the building until it was finished?

A. I worked on the building until it was practically a finished building.

Q. Every day, or nearly every day?

A. Every day, practically.

Q. Did you ever see a notice of any kind posted on that building? A. I did.

Q. Where did you see that?

A. On the foundation *that*, on a post.

Q. On the inside or outside of the building?

A. The outside of the building.

Q. When did you first notice that? [162—138]

A. I couldn't say the date. It was some time in February; the latter part of February.

(Testimony of John Johnson.)

Q. About how far along was the building at the time you noticed that?

A. We hadn't started on the building yet. It was just on the foundation.

Q. Did you notice it before the superstructure started? A. Yes.

Q. Did you read it? A. I did.

Q. Where did you stand when you read it?

A. Well, I was right there working right alongside of it.

Q. How high was it with relation to your own height, above you?

A. I could easily read it when I was standing below.

Q. What did you stand on?

A. I don't recollect if I stood on any timber or on the ground, but we were working right under, on the foundation of the building.

Q. Was the snow on the ground at that time?

A. I think it was.

Q. Did the men talk about it?

A. I couldn't say they talked about it on the building, but we discussed it down at the rooming-house where I was stopping.

(By Mr. BORYER.)

Q. What is your business? A. Carpenter.

Q. Can you read? A. I certainly can.

Q. About how many days before you began on the superstructure there did you see this notice? [163—139]

A. Why, I couldn't say as to that, because I didn't

(Testimony of John Johnson.)

keep track of anything like that, so close.

Q. Was it the day that you began the construction of the superstructure?

A. The day we began construction on the foundation?

Q. No, on the other part of the building?

A. I couldn't say as to that, what time exactly I see it, or what I was doing that day, because Goodall had quite a few men working for him and some of us would be working on the foundation and some of them would be overhead.

Q. I understood you to say you saw it before you began the erection of the building?

A. Before I was working on it, yes, because I was working on the foundation.

Q. When was the foundation finished?

A. Why, as to the date, I couldn't say, because they shiplapped some part of it.

Q. Did you see it before you had begun construction of the building? A. I think I did.

Q. Did you see it three days before?

A. I couldn't say as to the day.

Q. You are certain you say it two days before?

A. I am positive I saw it when I was working down below.

Q. On the basement? A. Yes, sir.

Q. Two days before you began the construction of the building?

A. Why, I was working down in the basement, and if he had commenced some on the building, I couldn't say as to that—that is, if he had some of

(Testimony of John Johnson.)

his men working on it.

Q. Was it two days before any lumber was delivered there for [164—140] the purpose of being used on the superstructure of the building?

A. I couldn't say how much material was delivered. I wasn't watching that part of it.

Q. As a matter of fact, you are not certain about any of it?

A. I am certain that I was working on the foundation, the basement of the building, at the time.

Q. You are certain you saw it about two days before the foundation was completed?

A. I am positive on that because I worked on the foundation for two or three days and the boys were joshing me at the house, where I was going to get my money and I said I was working for Charley Goodall.

Q. If Mr. Goodall testifies that the notice was put up there on the 24th day and the building was begun on the 24th day and that the foundation was practically completed on the 23d and entirely completed on the 24th, he is mistaken, then, is he, about that notice being posted on the 24th?

A. I said that I was working on the foundation, and he might have had some men working on the construction of it.

By the COURT.—Sometimes you speak of the foundation as the basement and sometimes you speak of the first floor as the basement.

Mr. RITCHIE.—When I refer to the foundation I mean the part that the basement rests on.

(Testimony of John Johnson.)

(By Mr. RITCHIE.)

Q. Do you know when the building upstairs was finished, that is, the building proper?

A. I couldn't say to the date. It was, I should judge, some time after the middle of April. [165—141]

[Testimony of H. A. Slater, for Defendant.]

H. A. SLATER, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. Where do you reside? A. Cordova.

Q. How long have you resided in Cordova?

A. Over three years.

Q. You have been in business on First Avenue?

A. Yes, sir.

Q. Where you are now? A. Yes, sir.

Q. Were you in town at the time the Borden foundation and the building which went up on the top of the foundation afterwards was constructed?

A. Yes, sir.

Q. Do you remember about the time the foundation was finished?

A. No, I do not. I should judge it was along in February or March.

Q. It was in the winter time?

A. It was in the winter time.

Q. Did you ever see a notice on any part of that foundation or of the building? A. I did.

Q. Describe that notice and state where it was.

A. Well, the notice is on the foundation, on that

(Testimony of H. A. Slater.)

side of the building (indicating).

Q. That is the south side of the building?

A. The south side of the building, yes.

Q. About how far from the street?

A. I should judge it would be about halfway of the building. [166—142]

Q. On what part of the foundation—that is, whether near the top or bottom?

A. It was near the top.

Q. When did you first notice that?

A. About the time that the foundation was completed.

Q. Where were you when you first saw it?

A. On the sidewalk.

Q. Did you ever go to it and read it?

A. No, sir.

Q. Was it easily seen from the sidewalk?

A. Yes, sir.

Q. Was it in a place sufficiently conspicuous so a person walking across the street and glancing toward the building would be apt to see it?

A. I could see it, yes, sir.

(By Mr. BORYER.)

Q. How did you happen to see it first?

A. Mr. Borden asked me to go over and look at it.

Q. Why didn't you read it.

A. I didn't go down to read it—he just asked me to see it was there.

Q. Could you read it from where you stood on the sidewalk? A. No, sir, I could not.

Q. Could you see any writing on it at all?

(Testimony of H. A. Slater.)

A. Yes, I think I could.

Q. Could you decipher any words on it?

A. No, sir, I could not.

Q. Do you know what kind of a notice it was?

A. Yes. Mr. Borden told—

Q. Of your own knowledge? A. No. [167—
143]

Q. You didn't read it? A. No.

Q. Could you read it from the point where you stood? A. No, sir.

Q. You don't know of your own knowledge whether it was a trespass notice or what it was?

A. No, sir, I do not.

Q. Do you know whether it was typewritten or in longhand? A. I do not.

Witness excused.

[Testimony of W. H. Borden, for Defendant.]

W. H. BORDEN, the defendant, called as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. Your name is W. H. Borden and you are one of the defendants in this action? A. Yes, sir.

Q. Where do you live now?

A. I live at the power-house, about three miles from Valdez-Solomon Gulch.

Q. Did you ever live in Cordova? A. Yes.

Q. When?

A. I came here first in November, 1907, and I lived here about three years. [168—144]

(Testimony of W. H. Borden.)

Q. That was when the railroad started?

A. Yes, that was in the old town.

Q. Did you live in the old town until the new town started? A. Yes, sir.

Q. And what did you do then?

A. I continued to live there for six or eight months after the new town started and then came over here.

Q. Look at that. What is that (handing witness paper)?

A. This is the original lease between me, representing one party, and the firm of Macaulay & Palmer, representing another party, and witnessed by John Goodell and D. J. Prendergast.

Q. Is that your signature, the first one?

A. Yes, sir.

Q. And these others?

A. These were made by the men who represented themselves as being of that name.

Q. And these witnesses,—you saw them sign?

A. Yes, saw them sign their names too.

(The lease is admitted in evidence as Defendant's Exhibit #20.)

Q. Now, was that lease executed on its date?

A. On the 17th day of February.

Q. You may state what buildings, if any, were on the ground at that time,—the 17th of February—had you started the foundation?

A. I don't think there was anything on there at that time. Some time previous to that there was a tent on here. I don't think it was on there at that time.

(Testimony of W. H. Borden.)

Q. Had you started the foundation at that time, the 17th of February?

A. I started the foundation, started to excavate. I forget [169—145] whether I started to put in the timbers. I had started to clean off the snow before that time. That is my recollection.

Q. Was the foundation wholly or mostly built after that date?

A. Most of it, I think, was built after that date. Some of it might have been done before that time. I am not positive about that.

Q. Who built the foundation? A. Mr. Goodall.

Q. By contract? A. By day's work.

Q. Who furnished the material?

A. I purchased the material from the Arctic Lumber Co.

Q. Who paid for it? A. I paid for it.

Q. Is it all paid for? A. It is.

Q. Was it all paid for at or soon after it was finished?

A. It was paid for. I paid for it by mailing check in a registered letter on the first day of March, 1910. I attempted to pay for it before that but couldn't pay for it in the manner I wanted to pay for it.

Q. It was paid for?

A. The check was mailed and put in the postoffice on the first day of March.

Q. The material was fully paid for? A. Yes.

Q. There has been a good deal of evidence here about the contract of Macaulay & Palmer with Mr. Goodall. Were you in any way a party to that con-

(Testimony of W. H. Borden.)

tract? A. I was not. [170—146]

Q. Did you have any talk with Mr. Stuart about the purchase of material for this building, before the building started?

A. I spoke to Mr. Stewart some time before I made the lease with Macaulay & Palmer. I had a talk with him about buying lumber from him and asked him if I had any credit with him, and he said my credit was good with him for sixty and ninety days, but no more.

Q. At the time he made the contract with Macaulay & Palmer, made the agreement testified to to furnish the lumber, were you around there at any time, anywhere near it?

A. I don't know when the contract was made.

Q. Did you have any part in the conversation between him and Macaulay & Palmer and Goodall as to the purchase of the material for the building?

A. I didn't have anything to do with it.

Q. Did you talk to anyone connected with the Arctic Lumber Co. about it?

A. Mr. Brown—he might have been here at that time.

Q. Did you talk with anyone regarding the purchase of this lumber for the building—anyone connected with the Arctic Lumber Co.?

A. I told you I had a conversation with Mr. Stewart about purchasing some lumber.

Q. Further than that?

A. No, not further than that.

Q. This lumber that you talked about buying from

(Testimony of W. H. Borden.)

him, was that for the foundation or the building?

A. I thought perhaps I might put a building on that. I had come up here in answer to a cablegram I got and afterwards got a letter offering me certain inducements to put a house [171—147] up, and I talked to Mr. Stewart about the price of lumber and asked him if I had any credit with him.

Q. Do you know when the work started on that building—not the building, but on the foundation?

A. I think the work started very late in the afternoon of the 24th or the morning of the 25th. I am not positive whether it started on the 24th or not, but I think the work on the superstructure started on the 25th, one day later than the other. I am not positive about that. There might have been something done in the afternoon. I couldn't say.

Q. Were you present at the time that Mr. Goodall made his contract for the construction of the building? A. No.

Q. You had nothing to do with that contract at all?

A. Mr. Goodall told me that he was going to make a contract but I had no connection with it at all. He told me he intended making it.

Q. Did you take any part in the negotiations with Macaulay & Palmer? A. None whatever.

Q. Were you present when the contract was signed? A. I was not.

Q. Did you ever post a notice under the statute warning any person who furnished material or labor on the proposed building which Mr. Goodall was put-

(Testimony of W. H. Borden.)

ting up for Macaulay & Palmer, that you would not be liable for it? A. I posted a notice.

Q. There is a copy of that notice attached to your answer in this case? A. Yes, I believe so. [172—148]

Q. You don't remember that?

A. I think there was a typewritten copy. I am not positive whether you put one in or not.

Q. Read that and state if that looks like the notice, the reading of it.

A. That is a copy of the notice I wrote at that time. This is a carbon copy of the original notice I posted on the foundation.

Q. Who wrote that notice?

A. Mr. W. T. Love, an attorney living here at that time drew it up for me.

Q. And that is a carbon copy of the original?

A. That is a carbon copy of the original.

Q. What did you do with the original?

A. I put it in a frame and nailed it to the foundation of the building,—put it in a frame with a glass front on it.

Q. On what day? A. The 24th of February.

Q. What time of the day?

A. In the neighborhood of three o'clock in the afternoon, I think. I know it was getting pretty near dark. It was the winter time.

Q. Where did you stand when you put it?

A. I may have stood on a small box or board or something of that sort. There was a big pile on the side of this building. There was about four feet

(Testimony of W. H. Borden.)

of snow which was packed tight by the rains, and on the top of this snow there was an amount of snow that was more or less loose, that had been shoveled out from the excavation, and I stood on that snow on a box or plank or something of the sort—I don't know, I [173—149] don't remember exactly. There was a hole there between the edge of the snow and the foundation post, as the excavation had been made 26 ft. instead of 25 ft.

Q. You had to stand back?

A. I was probably back,—not at arm's-length. I was not back so far that I couldn't drive a nail.

Q. How high did you nail that on—higher than your head or lower?

A. It wasn't much higher than my head. The top of the frame, which contained the notice would come a little bit above my head. It was not very far above my head because I wanted to be careful not to break the glass and I couldn't handle a hammer very readily if it was two or more feet above my head—it was 12 or 14 inches above my head.

Q. Was there anyone with you when you put that up? A. No, I was alone.

Q. Why did you select that place for putting up the notice?

A. Well, there are, I guess, about six reasons I put it at that particular place. One is, my lawyers advised me to put it at that particular place in preference to any other place.

Q. What other reason did you have?

A. One reason I didn't place it on the back of the

(Testimony of W. H. Borden.)

lot was there was never anybody out there. Then I didn't place it on the front of the lot because it would have been—would not have been in a place that I would consider a conspicuous place. It would have been necessary to lean over the railing if I placed it on the front of the foundation—lean over the railing of the sidewalk and look down and one could only see the top edge of the board. I placed it on the side because the paper was white and the reflection of the sun would show the paper up very clearly. I didn't [174—150] place it on the north side of the building and nail it to the Boyle drugstore because when the sidewalk was closed, I did not want it to interfere with the 2x6 joist. I didn't want to place it on the wall of the Boyle building because after the floor was laid, I knew that an upright would be placed against that building and press right up against it, and I thought one of the uprights might touch the frame and if it came between the frame, it might be concealed as the inside wall was concealed, and I wanted it to be exposed, not only at the time that the work was commenced, but I wanted it to be in a place where it could be seen continuously for a number of days afterwards,—in face, I wanted it to be where it could be seen throughout the entire construction of the building.

Q. Just state the condition of the sidewalk in front of the building at that time, where the building was to go.

A. The sidewalk was made, I think, of 2x6 and 2x4 timbers and underneath those were sills running

(Testimony of W. H. Borden.)

lengthwise of the sidewalk, running north and south, and one of those sills was very badly damaged, broken, and we never understood how it held in place.

Q. Were people traveling over that sidewalk?

A. They were until I started to work there and I feared a damage suit in some way or other, so I caused the sidewalk to be blockaded.

Q. About what day was that?

A. I don't know when I did that. It was after I found out the condition of the sidewalk. I didn't know what a terrible condition that sidewalk was in until I got underneath it.

Q. Do you think that was before or after the last day of February? [175—151]

A. I don't remember.

Q. It was about that time?

A. It was a few days after the work started.

Q. Now, that is a carbon copy of the notice you put up?

A. That is a carbon copy of the notice you put up.

Q. Except this has no signature to it—did the original have a signature?

A. The original has a signature; yes.

Q. Whose signature was that—your own personal signature, signed with your own hand?

A. Yes, sir.

Mr. RITCHIE.—Write your name on the bottom of that.

Mr. BORYER.—We will admit that.

Mr. RITCHIE.—I want his name on the bottom to make it an exact copy of the original.

(Testimony of W. H. Borden.)

The WITNESS.—That is the usual way I sign in writing checks.

Mr. RITCHIE.—We offer this in evidence as a copy of the original notice, a carbon copy, an exact copy.

(It is admitted as Defendant's Exhibit 21.)

Q. Was there any place at the top or about the top of the front of the foundation where you could have posted that notice, that it would not immediately have been interfered with by the work on the superstructure? A. On the foundation, at the front?

Q. Yes, around the top of it?

A. They were piling lumber around there and the snow frequently concealed the ends of the stringers, sometimes called capping. There were three rows of posts running from the front of the lot to the back of the lot, one row on the north side, one on the south side and one from the centre, [176—152] and the end towards the street of those caps or stringers was partly concealed, sometimes by snow which was sliding down when the lumber was slid down underneath the sidewalk.

Q. I hand you Defendant's Exhibit 19 and ask you whether or not that is a correct representation of that part of First Avenue about the last of February, 1910.

A. It was at the time I posted that notice, yes, the last of February. I presume some studding might have been shown here next to the Boyle building, but this was a correct view on the 24th of February.

Q. That shows the front view of the lot before the superstructure was started?

(Testimony of W. H. Borden.)

A. Yes, there was a bridge and the travel on the street was on this side.

Q. If there was any way you could get down under the basement from the foundation, on the street, tell the Court how that was.

A. I always went down by the stairway leading into the theatre. That stairway led to the entrance to the theatre—you might say the only entrance to the theatre—that was in the wall, that was in the east or front wall of the basement of the Cordova drug-store.

Q. Was that a commonly used stairway?

A. It was used every time they had a show at the theatre.

Q. It was the regular entrance to the theatre?

A. It was the regular entrance to the theatre, up to that point. Then I turn to the left and go through the opening and there was a stairway there, a few steps, three or four steps leading down to the snow and rock and stuff down underneath there.

Q. Did you ever have any talk with Mr. Stewart or anyone else [177—153] representing the Arctic Lumber Company or any correspondence with the Arctic Lumber Co. after Mr. Goodall started on the Macaulay building in regard to the material furnished for it?

A. Yes, I went to the office of the Arctic Lumber Co. on the first day of March. I went there to pay for the lumber which I had purchased for building this foundation structure, and I had with me several sheets upon which there were items, bills of lumber,

(Testimony of W. H. Borden.)

which I had bought from him and attached to the several sheets there was a separate sheet itemizing all the items—no, there was a list of items but not itemizing them except as to the amount. This separate sheet was attached to the individual bills that gave the dimensions and quantity of lumber, and on the bottom of this slip which was fastened with clips of some kind to the itemized bills there was a typewritten statement that Mr. Love put on there for me. I have got that somewhere in my papers. I don't remember exactly what that typewritten statement was, but it was something to the effect that I am not responsible. I would not be responsible for any material delivered to the property except for the foundation structure, and I read that over and asked Mr. Stewart to receipt it and accept my draft on a North Carolina bank, and he snatched off the cover, like that, and handed me back some of the bills, the itemized bills, and said, "I won't sign that." Then I said to him, "Well, give me that paper that you have torn off, because I want it," and I took it back and then I said to him, "What is the matter with it? Why wouldn't you sign a receipt of that kind?" "Well, I won't sign it, that's all."

Q. Stewart said that? [178—154]

A. Yes. I couldn't repeat his exact words, but I know he wouldn't receipt the bill as I wanted him to receipt it, and he gave as his reasons the fact that it had this typewritten matter on it. I said to him, "I want you to understand I am not paying for this building; this building is being built by Macaulay &

(Testimony of W. H. Borden.)

Palmer, and I have a notice posted on that building to that effect. I am building the foundation and have a check to pay you for all the lumber in that foundation, and that is all I am going to pay for, and I have a lease with Macaulay in which they have agreed to put a building up and they are going to do it without any expense to me. I want you to understand I don't propose to pay for it and I have put that notice on there to protect myself against any lien." He said, "I don't care whether you have put a notice on there or not"—I don't know his exact words—"but it doesn't make any difference whether you put a notice on there or not; that is not going to affect the lien feature of it at all. If this lumber is not paid for we will put a lien on that lot all right." This got me a little bit rattled—I didn't know about the law in the case. I had read what the code said about a notice being required but I didn't know what to do, and I went to Mr. Love and stated my case to him, and he composed the letter for me which I mailed to the Arctic Lumber Company, but in writing that letter to the Arctic Lumber Company I still wanted to take extra precautions. I registered the letter and in addition to registering the letter I called in Charley Graber and told him I wanted him to make an affidavit on the bottom of the copy of the letter certifying that I had mailed that letter.

Q. Do you know whether Mr. R. R. Stewart or the Arctic Lumber [179—155] Company ever got that letter?

A. Yes, I got an answer to it, admitting that they

(Testimony of W. H. Borden.)

had received the check, and I think the receipt was worded, "We have received check from you for all lumber covered by this payment."

Q. State what those three documents are pinned together there.

A. The first document is a register receipt Number 3928, which I got from the Cordova postoffice on the first day of March, 1910. It shows that it is a receipt for a letter mailed by W. H. Borden to the Arctic Lumber Company at Cordova, signed just P, Postmaster per P; the second sheet is a carbon copy of the letter I sent to the Arctic Lumber Co., and the third sheet is a letter from the Arctic Lumber Co. to me and signed by Arctic Lumber Co. by R. R. Stewart.

Q. Was this lower part which is apparently signed by Chas. Graber also on the letter you sent to Stewart?

A. No, that was on the copy; the affidavit of Charles Graber was on my carbon copy, but not on the original letter.

Mr. RITCHIE.—We would like to offer these three papers as an exhibit, with the admission that the lower part of the letter signed by Charles Graber was not on the letter sent to the Arctic Lumber Co.

(They are admitted as Defendant's Exhibit #22.)

Mr. RITCHIE.—I will just read the letter.

[Defendant's Exhibit No. 22—Letter Dated March 1, 1910, W. H. Borden to Arctic Lumber Co.]

“Cordova, Alaska, March 1st, 1910.

Arctic Lumber Company,

Cordova, Alaska.

Dear Sir:

Enclosed find draft on Bank of Wayne, Goldsboro, N. C., for \$312.92 in full of your bill of lumber sold to me for the foundation structure on Lot 21 of Block 2 of the town of Cordova.

Under my lease with Messrs. Macaulay & Palmer I agreed to erect the foundation on said lot and they agreed to erect the building thereon at their own expense and turn the same over to me at the end of five years to be then my property and free from debt or mechanics' liens as part consideration for said lease.

[180—156] They agreed to protect me from any mechanic's lien and this protection has been secured by my posting a mechanic's lien notice on the property according to law.

Respectfully Yours,

W. H. BORDEN.”

Mr. RITCHIE.—The answer of the Lumber Co. is as follows:

[Letter Dated March 5, 1910, Arctic Lumber Co. to W. H. Borden.]

“Cordova, Alaska, March 5th, 1910.

W. H. Borden, Esq.

Cordova, Alaska.

Dear Sir:

We acknowledge receipt of your draft for \$312.92 and thank you for same.

(Testimony of W. H. Borden.)

We enclose herewith the receipted bills for material covered by this payment.

Yours truly,

ARCTIC LUMBER CO.

By R. R. STEWART."

Q. The receipted bills were for all the bills for the foundation?

A. For the foundation, yes. I think I afterwards bought some more lumber—no, I didn't buy any more lumber for the foundation.

Q. How long did you remain in Cordova in the year 1910 after this building started?

A. I left here on the third day of April.

Q. Where did you go? A. I went to Juneau.

Q. When did you return to Cordova?

A. I think I arrived here on the 28th day of February, 1911.

Q. You were not here, then, from the third of April, 1910, to the 28th of February, 1911?

A. No.

Q. You were away from Cordova during all of that time? A. Yes, sir.

Q. Did you have any agent in Cordova?

A. I did.

Q. Who was that? [181—157]

A. Mr. Charles Goodall.

Q. Did he have charge of this property and everything connected with it that interested you?

A. Yes, sir.

Q. For you?

A. Yes, he collected the ground rents.

(Testimony of W. H. Borden.)

Q. Did he remit same to you from time to time?

A. Yes, sir.

Q. Did you get any information at any time during your absence that the Old Crow Company had gone up—that Macaulay & Palmer had left?

A. I heard that Palmer had left and then I heard that Macaulay had left.

Q. Did you hear from Mr. Goodall or anyone else in the fall of 1910 that they had left town?

A. Yes.

Q. Was there any rents paid to you or to Mr. Goodall for you, of which you had notice, in the fall of 1910? A. Yes, I got rents.

Q. Where were you at that time?

A. In Seattle.

Q. I see by your lease here that among the other covenants is this. The parties of the second part agree to insure the building to be constructed on said lot against loss by fire in a sum not less than twenty-five hundred dollars. Do you know whether or not Macaulay & Palmer ever caused that to be insured?

A. They took out an insurance policy, as I understand, but never paid for it. The agent made them remit it, I think, canceled their policy, because they didn't come through with the money. [182—158] I don't know that to be a fact. That is hearsay.

Q. Did you ever take any steps, on account of any breach of any covenant in the lease to be performed on their part, did you ever take any steps to take possession of the property and forfeit the lease? If so, you may state what.

(Testimony of W. H. Borden.)

A. I never took any legal steps to get possession of the property.

Q. Did you take any steps of any kind to get possession of the property and did you get possession of the property?

A. My agent got possession of the property for me in March.

Q. Of what year? A. 1911.

Q. That was just after you return here?

A. Shortly after my return.

Q. Do you know who had possession of the premises during the fall and winter of 1910?

A. The early part of 1911 when I came here, the 28th day of February, Woods was moving in there, the moving picture man.

Q. What was the last rent you received from Macaulay & Palmer?

A. I never received any rent from Macaulay & Palmer directly. I received rent from my agent here. He told me where it came from.

Q. You have no personal knowledge of what happened during your absence but your information comes from Mr. Goodall and possibly other persons who may have talked to you about it?

A. Yes, I have no positive means of knowing. I was not here.

Q. Who is in possession of the premises at this time?

A. Well, the Cordova Commercial Co. have some goods in there that they have not taken out, and they are permitted to have a key to the building, although

(Testimony of W. H. Borden.)

they don't claim to be tenants [183—159] of the building and are not paying any rents. Goodall has charge of the building.

Q. He is your agent? A. Yes, sir.

Q. And you are in possession of the building except so far as you have tenants, whom you have permitted to occupy it? A. Yes, sir, I am in possession.

Q. How long have you been in such possession?

A. Since March—some time in March, 1911.

Q. In this lease I see that the lessees covenant to pay taxes. Have there been any taxes assessed against the property? A. Yes, I paid them.

Q. Did Macaulay & Palmer ever pay any taxes?

A. Not to my knowledge.

Q. I find this clause also. The failure of the parties of the second part to perform any of the covenants herein contained shall in like manner render at the option of the party of the first part, this lease null and void. Will you state whether or not you have exercised that option and declared the lease forfeited. A. I have taken no legal action.

Q. You heard what I read. The failure of the parties of the second part to perform any of the covenants herein contained shall in like manner render at the option of the party of the first part, this lease null and void. Have you exercised that option?

A. I asked Mr. Goodall to see what he could do—to do his best to get that building for me if he could.

Q. Did he get it? A. Yes. [184—160]

Q. And are you in possession of it through Mr. Goodall as your agent now? A. Yes, sir.

(Testimony of W. H. Borden.)

Q. And have been since the time you have mentioned? A. I have been since March 11th.

Q. After you returned here on the 28th of February, 1911, did you go upon the premises? A. Yes.

Q. Did you go into the basement? A. I did.

Q. Did you see any small lumber 1x12—10 or 12 feet long in the basement? A. I did.

Q. Where was it?

A. At the time I saw it it was in front of the building, in front of the basement.

Q. Was it piled up or scattered around?

A. It was piled up.

Q. Do you know what became of that lumber?

A. No, except—

Q. You know nothing except what other persons have told you? A. No.

Q. Did you see any quarter-round around there that was not in use?

A. If I did I don't know anything about it. I may have, but I don't have the lumber in mind.

Cross-examination.

(By Mr. BORYER.)

Q. Is this the original lease or contract you had with Macaulay & Palmer for the construction of that building? I refer to Defendant's Exhibit Number 20. [185—161] A. Yes.

Q. Was this lease ever changed or altered?

A. It was not. You ask me if that was ever changed or altered. Did I ever make a new lease with them, you mean?

Q. Yes. A. No, I did not.

(Testimony of W. H. Borden.)

Q. This is the contract between you and Macaulay & Palmer? A. Yes.

Q. You say you are in possession of the property at the present time? A. I think so.

Q. You claim to be, do you? A. I claim to be.

Q. You forfeited this lease?

A. I took possession of the property. I took possession of the building.

Q. You took possession because Macaulay & Palmer had failed to live up to the agreements as contained in this contract.

A. Yes, that is one reason I took possession; that was the reason I took possession. I took possession because I could.

Q. Did you say that this \$75 was a ground rent?

A. What \$75?

Q. That is provided for in this lease; they were to pay you \$75 per month? A. Yes, sir.

Q. Is that for ground rent?

A. Yes, and for the rent of the foundation. I presume I got pay for that as well as the lot.

Q. Why did you say you boarded up the sidewalk in front of your place?

A. Stopped the traffic, you mean?

Q. Yes. [186—162]

A. Well, one reason was I didn't want anybody killed there.

Q. You mean it was dangerous to walk on that side of the street? A. It was.

Q. And people went on the other side of the street then—walked on the other side of the street?

(Testimony of W. H. Borden.)

A. At what time?

Q. At the time you had it boarded up?

A. Some *climed* over these boards, stepped over them and went on the sidewalk anyway.

Q. A few people? A. Yes.

Q. But your object was to stop them from passing along down on that sidewalk in front of the building?

A. That was one object; and another object was to keep people from collecting in a crowd and standing there and looking down at the work going on. I have seen as many as four or five people collect right there on the edge of the sidewalk and I knew it was very dangerous.

Q. Then one walking down First Avenue, say, from C Street down towards B Street, when they would get down to this point where you had it boarded off, they would have to go out in the street and walk on down on the other side?

A. At the time the boards were up there they would have to do that or climb over the boards or stoop under them.

Q. How long were those boards up there?

A. I presume they were there a month or a little more.

Q. And they were put up there at the time you put your foundation in?

A. I think they were put up after the foundation had been completed. [187—163]

Q. Do you know?

A. No, I don't know the exact date when I put

(Testimony of W. H. Borden.)

those boards up there.

Q. People coming down from B. Street and coming in the direction towards C Street, if that was boarded up over there, they would naturally come up on this side of the street—on the opposite side of the street? A. Ladies did, some men did not.

Q. But that sidewalk in there between B and C was blocked, was it not?

A. That portion of the sidewalk was blocked.

Q. When you posted this notice down there, how did you get down to it?

A. I went down the theatre stairway until I reached the foot of the stairs; then I turned to the left and went down three or four crude, very rough steps that were in a rather dilapidated condition.

Q. On whose property were those steps?

A. I think they were on the city's property, on the sidewalk, as I understand it.

Q. On the sidewalk in front of Lot 21?

A. I don't know exactly. Most of those steps are on the sidewalk.

Q. Did you cross the lot, cross the face of that lot?

A. Walked south in front of the lot until I came to the southeast corner and then turned to the right.

Q. That was the natural way to get to the point where you placed this notice?

A. That was the natural way.

Q. Weren't you afraid that that dangerous walk would fall on [188—164] you and injure you?

A. No, not at that time.

(Testimony of W. H. Borden.)

Q. I thought you said it was dangerous?

A. I did think it was dangerous and I never walked under there when I saw five or six people standing there.

Q. You waited until you saw there was nobody up there and then shot across in order to avoid the danger?

A. No, I don't think that gave me very much thought. When I wanted to go down, I went down.

Q. You knew that the sidewalk was dangerous?

A. I knew that the sidewalk was in a dangerous condition.

Q. And liable to collapse and fall at any time?

A. If people were on it—yes, I believed that.

Q. When you stepped down off of these steps you stepped down on to your lot?

A. No, I don't think so. I think I stepped down on the sidewalk. I think I stepped on ground that was not on the lot or rather snow at this time.

Q. Were there any posts or joists or uprights sticking up there close to those steps?

A. Yes, there was a number of small posts that held the old sidewalk in place there.

Q. The foundation was completed at that time, was it not?

A. When I went down to put the notice up?

Q. Yes. A. I don't think it was.

Q. You put your notice up on the 24th?

A. Yes, sir.

Q. Mr. Goodall testified it was fully completed on the 24th?

(Testimony of W. H. Borden.)

A. He might have worked an hour after I put the notice up.

Q. It was practically completed at that time?
[189—165]

A. The foundation? I don't think the foundation was completed until probably the 25th. I don't know.

Q. Is Mr. Goodall mistaken when he said it was completed on the 24th? A. I don't know.

Q. It was practically completed when you put the notice up?

A. It was practically completed when I put the notice up, yes. I would consider it completed or nearly so.

Q. If you put that notice on those posts or joists or uprights that were convenient to this opening or those steps, would it have been in the way?

A. The snow would have been in the way—the notice would not have been in the way. The snow would have been in the way of the notice.

Q. But anyone attempting or trying to get on to that property that was the natural way to get on to it? A. Getting on to that lot?

Q. Yes.

A. It depends what you mean by getting on the lot, whether you mean walking on the ground or on the stringers.

Q. Getting down there for the purpose of working or any purpose—that was the natural way to get down on this lot—that was the natural way to go and see this notice that you posted on the ground?

(Testimony of W. H. Borden.)

A. It was not. I said down on the lot was not the natural way to get to the notice.

Q. What was the natural way?

A. The natural way to get to that notice was to walk south along the front of the lot until you reach the southeast corner of the lot, then turn to the right and walk to the [190—166] place where the notice was.

Q. But there were posts and joists and uprights sticking up there after you had passed out of this opening from those steps, lower steps?

A. When I passed out from the opening there was upright posts there that supported the old sidewalk.

Q. Now, you seem to have been very anxious to put the Arctic Lumber Co. on notice that you would not be responsible there. As a matter of fact, you didn't write them this letter until the first day of March, did you?

A. I wrote it on the first day of March.

Q. You posted your notice on the 24th day of February? A. Yes, sir.

Q. Now, in the meantime they had furnished for that building, for that property, over a thousand dollars worth of material between that and the time you had posted your notice on the 24th day of February? A. Yes, sir.

Q. When did they begin furnishing lumber there?

A. I don't know exactly when they commenced furnishing it for me.

Q. I mean for the property?

A. They claim they commenced on the 23d.

(Testimony of W. H. Borden.)

Q. Did they furnish any lumber on the 24th?

A. I don't know.

Q. Was there any lumber there where you posted the notice? A. The foundation was there.

Q. Was there any material furnished for the superstructure on the 24th?

A. Not one foot of lumber. I took particular pains to see that [191—167] there wasn't a foot of lumber.

Q. On the 24th? A. On the 24th.

Q. Was there any there on the 25th—were you on the property on the 25th?

A. I was around there, but I don't know on the 25th whether there was or not.

Q. You don't know whether they brought any lumber on the 25th or not?

A. No, my impression is—they worked on my foundation—that work on my foundation and the Macaulay & Palmer building was merging in together so closely there between the 23d and 24th that I couldn't tell when the foundation came to an end and when the Macaulay & Palmer work commenced. I consider the beginning of the Macaulay & Palmer work as the day the piece of shiplap was laid.

Q. Now, you were there every day, were you not?

A. I think I was.

Q. Did you see any lumber delivered there the 24th, the day you posted your notice?

A. I don't know.

Q. Did you see any delivered there on the 25th?

A. I don't know.

(Testimony of W. H. Borden.)

Q. On the 26th? A. I don't know.

Q. On the 27th?

A. I don't know that I saw any.

Q. On the 28th? A. I don't know.

Q. Was there any delivered on the first? [192—
168]

A. I don't know any particular date. I don't know of any particular date when any lumber was delivered for me or the other parties.

Q. Why did you send this letter to Stewart?

A. Because of the conversation I had had with him in the office and because of my lawyer's advice.

Q. They hadn't begun to furnish any lumber as far as you knew? Do you remember now that they had begun to furnish any of the Lumber?

A. For Macauley & Palmer, up to that time? I knew they had furnished lumber to Macaulay & Palmer.

Q. Before the first? A. Before the first.

Q. Do you know if the Arctic Lumber Co. furnished any lumber between the 24th of February, 1910, and the first day of March, 1910?

A. I am quite confident they did. There was lots of lumber out on the street. I presume that was lumber for Macaulay & Palmer and I understood it was furnished by the Arctic Lumber Co.

Q. And you knew it at the time?

A. I understood it at the time.

Q. There was six days, then, between the time that you filed or posted this notice, before you notified the Arctic Lumber Co., was there not?

(Testimony of W. H. Borden.)

A. There was not.

Q. You put up your notice on the 24th, did you not? A. I did.

Q. You notified them on the first, did you not?

A. I did.

Q. How many days is that? [193—169]

A. That is five.

Q. Why didn't you notify them the day you put up the notice?

A. Well, I hadn't been advised by my lawyer to do so and I hadn't had this conversation at this time.

Q. Why did you put up your notice?

A. Because I thought it ought to be there.

Q. For what purpose?

A. I asked the lawyer who drew up my lease if I should put it there. I had read the Alaska Code before I signed this lease and I asked my lawyer if I should put the notice there, and he said, "I don't believe I would bother about it unless you find out that Macaulay & Palmer are not paying cash for the lumber," and I found that out and I thought it would be wise to put that up,—I didn't like that sort of advice, and I asked another lawyer what he thought about it and he said by all means put the notice up.

Q. And after you put the notice up, it was for the purpose of notifying the Arctic Lumber Co.?

A. I put the notice up to notify the world or anybody that might supply any kind of material of any nature.

Q. You knew Mr. Stewart—you knew him at that time? A. Yes.

(Testimony of W. H. Borden.)

Q. You saw him on the street daily?

A. Yes, sir.

Q. You knew where his place of business was?

A. Yes.

Q. It is situated about a block and a half from your lot—the place of business of the Arctic Lumber Co.?

A. It is around the corner.

Q. About a block and a half?

A. I don't know what you call a block and a half.

[194—170]

Q. About what distance is it?

A. Between four and five hundred feet from his office to the lot; something like that.

Q. What was your object in putting this statement on this receipt that you delivered to them, that you had drawn up yourself on the first day of March?

A. I wanted to do that because my lawyer thought it would be advisable to do it. I told him the circumstances, and he thought, after being told, that it would be advisable for me to do what I did.

Q. When did you consult your lawyer about that?

A. About paying this bill?

Q. Yes—about how many days before you drew this receipt up? I understand that you drew this receipt after you had consulted with the attorney, the paper that you took down to them, asking them to sign—when did you consult your lawyer about that?

A. I don't know how many days it was before that.

Q. Several days?

(Testimony of W. H. Borden.)

A. I don't know. It might have been one or it might have been the same morning. I don't know.

Q. How far from the street is it to the place where you posted this notice?

A. I never measured it. I think it is very near the middle or a few feet nearer the front, I should judge. I supposed so at the time I put it up.

Q. The middle of what?

A. Halfway between the east and west boundary lines of the lot.

Q. What is the length of the lot? A. 100 feet.

Q. Now, can you see that notice from the street?

[195—171] A. Yes.

Q. Can you read it from the street? A. No.

Q. Can you tell what kind of a notice it is from the street? A. No, not by looking at it.

Q. You can see something there from the street?

A. Yes, I can see—

Q. A piece of glass and a piece of paper is all you can see? A. Yes.

Q. In order to see whether that is a notice or whether it is a blank piece of paper or what it is, you have got to go around and go down these steps and across this lot? A. Which lot?

Q. The lot upon which the house is put?

A. Yes, across the front of it.

Q. Underneath and in front of that dangerous sidewalk and then go back along down the house for fifty feet before you can read it?

A. Approximately that.

(Testimony of W. H. Borden.)

(By Mr. RITCHIE.)

Q. The pleadings in this case set up your ownership of these premises at the time the pleadings were filed in February, 1910. Have you been at all times since that date the owner and are you now the owner of these premises? A. Yes.

(By Mr. BORYER.)

Q. I will ask you if Plaintiff's Exhibit "U" is not a correct copy of Defendant's Exhibit #20, with the exception that the witnesses' names are omitted.

A. I don't think it is. I don't believe they are alike. I will have to compare them word for word before I could [196—172] know.

Mr. RITCHIE.—This is a certified copy. We will admit that it is a copy or substantially a copy. We will admit that is substantially a copy—there may be one or two errors.

Mr. BORYER.—You will concede it is substantially a copy?

Mr. RITCHIE.—It undoubtedly is. I presume you will stipulate that this was filed and recorded as shown by the commissioner's certificate—the lease?

Mr. BORYER.—Yes, sir.

Q. That lease was recorded on the first day of March, 1910, was it not? A. I think so.

Q. After the notice had been posted on the ground? A. Yes.

Witness excused.

Defendant rests.

Testimony closed. [197—173]

*In the District Court for the Territory of Alaska,
Third Division.*

C. 11.

ARCTIC LUMBER CO.,

Plaintiff,

vs.

W. H. BORDEN et al.,

Defendants.

[Minutes of Court—May 29, 1912] Trial Continued.

Now, on this day, this cause coming on again regularly for trial before the Court, plaintiff being represented by R. J. Boryer, Esq., and the defendant being represented by E. E. Ritchie and John Lyons.

WHEREUPON the following proceedings were had, to wit:

WHEREUPON both plaintiff and defendant having heretofore rested, arguments were had by the respective counsel herein, and all and singular the law in the premises being considered by the Court, the Court rendered its oral decision and finds for the defendant; and,

**[Order Re Preparation of Findings of Fact,
Conclusions of Law and Decree.]**

IT IS ORDERED that the Findings of Fact and Conclusions of Law and Decree be prepared in accordance therewith, and pursuant to oral stipulation by the respective counsel herein, in open court, the said Findings of Fact and Conclusions of Law and Decree are to be prepared and taken up at Valdez, Alaska, on the 15th day of June, A. D. 1912.

The above is a copy of the Trial Minutes found at page 286, Journal C 1, under date of May 29th, 1912.
[198—173½]

[**Opinion.**]
DECISION.

By the COURT.—The Court decides in this case regarding the date from which the three days' run in which it was necessary to post the notice that that time began to run from the erection of the superstructure and not from the beginning of the foundation.

If, as the Court understands this testimony, it was originally the intention of Mr. Borden to himself erect a building and he couldn't get the credit; that he put up this foundation. If the time runs from the beginning of the foundation, as plaintiff contends it would be absolutely impossible for him to protect himself against a lien unless he tore down the foundation or got another lot. The Court does not disagree at all with those decisions read by Mr. Boryer regarding the commencement of the building dating from the time the excavations are made for the foundation or cellar dug—some permanent and obvious change on the surface of the ground indicating the intention to erect a building would be the best and surest and safest test for all people interested, safer than the delivery of material that might be carted away immediately, something that could be changed, and there would be no way to establish exactly, by people having a chance to observe, when it did occur or exactly what its nature was. But the language of the statute is—

“Within three days after he shall have obtained knowledge of the construction, the owner shall post this notice.”

If he was a nonresident, it might be all over with before he did obtain knowledge; therefore, it is not a matter of constructive notice or constructive knowledge that is referred to; it is actual knowledge. If it were a matter [199—174] of constructive notice, there would be more reason in Mr. Boryer's argument that the time when the foundation was started and excavation made would control, but here, the owner having built the foundation and leased and got the lessees to enter into a contract with him that they should construct as part of that lease a certain building, a different rule would apply and the time begin to run in the Court's opinion from the time that he obtained knowledge of the commencement of this superstructure on his foundation.

Regarding the notice, whether it was posted in a conspicuous place or not, the Court concludes that it was. There must be taken into consideration in this case that the lot itself was not conspicuous—it was 25 feet below the sidewalk and any one might go along there and never see the lot. If you posted your notice up 25 or 30 feet in the air so you could see it from the sidewalk, a man might say it was not conspicuous from the lot, from the surface of the lot. It would not have been conspicuous anywhere on the surface of that lot from the sidewalk. It could not be read any more plainly from the sidewalk if it was anywhere on the surface of the lot in

ordinary writing or typewriting than it can where it is. The argument does not appeal to the Court that someone would have to be guilty of trespass to get around on the outside of the building to read this notice. The building covers the lot, and it was plainly posted on the only exposed outside wall of the foundation. If it had been up on the inside wall, it would be soon covered by the flooring and be in the dark and come directly within the rule of the case cited by Mr. Boryer where the notice was posted in a recess of the partition [200—175] wall. It might then have been more conspicuous at first, but its purpose is not limited to the beginning of the work. "Some conspicuous place" is all that is required, not the most conspicuous place.

There is no evidence of bad faith whatever on the part of Mr. Borden. He seems to have been very diligent in trying to give notice. This notice was, as he testifies, for everyone throughout the time of construction—not only for the materialman when he began delivering the material, but for the workmen that were engaged in the construction. Posting a notice implies some degree of permanency, that it is to be left where you put it and not a notice on the studding at one time and then later, when lathing or plastering, putting it somewhere else—having it perambulate around the building.

Regarding the completion of the building the Court is very much inclined to follow the reasoning of the case read by Mr. Boryer about the commencement of the building, that is, in determining when the building was completed. The most exhaust-

ively reasoned of those opinions stated that the commencement dated from the time when a person of ordinary observation would know a building was in progress of construction, when everyone would recognize that it was being constructed. That is the rule that the Court is inclined to follow in determining when a building is completed, and the Court is inclined to the view that the most obvious and convincing evidence that a building is completed is when it is occupied for the purposes for which it is being constructed, and that in any departure from that rule, the structure must so manifestly be incomplete that ordinary observers can see it is incomplete, the materialman [201—177] who delivers his material and the workman who works upon the building and the mortgagee who looks over the building or the purchaser who comes to buy the building, or the ordinary creditor, that he may see the incompleteness without digging up contracts that may be in pigeon-holes or somebody's vest pocket. Whether it is exactly constructed and completed according to the plans and specifications he need not determine. There may be cases where on account of the situation or relation of the parties this broader rule would not obtain, where the Court would go behind what was obvious to the ordinary observer, but this is not one of those cases. A building, of course, may be completed before occupancy, but when occupied, its completion is to be presumed in the absence of its obvious incompleteness.

The Court concludes regarding the material furnished after April 14th that it went into changes

and alterations and repairs; that there might be a lien for such if the lien had been tolled by the delivery of this other material, although the lien for the material for the construction of the building had been defeated by the completion of the building itself too long a time before the filing of the lien.

The Court is inclined to follow the case in the 44th Pacific, where it was material outside of the church in a sidewalk liened for—that is what the Court finds this back porch was. It is easy to understand that a sidewalk on the ground floor is not a part of the building, and when you go upstairs and put out a stoop or porch on the level of that floor, it is not any more than a sidewalk—it is a sidewalk for the second or third floor or wherever it happens to be; it is not on the lot. It may be affixed to the building [202—178] for the purpose of a support, but it is a sidewalk in the street.

The Court concludes that this lien is not even tolled as regards these other defendants, the lessees,—that the lapsing, the allowing of thirty-one days to run after the furnishing of these two little bills of material in July and August defeats the lien so far as they are concerned.

Regarding this matter of evidence, as to whether a materialman has to stand there and see that his material goes into the building, the Court does not think that is necessary. He does not have to do it where the material is furnished in the ordinary course of business, when a building is being constructed and materials furnished and there is no evidence that any other material than his went into the

building; when it is being ordered every day by the wagonload and the transferman that delivers it testifies he takes it up and leaves it—the Court presumes that it goes into the building. But where you begin to deliver twenty-four cents worth every thirty days, a different presumption of fact arises, and the burden shifts in this matter, and the Court begins to presume right there that it did not go into the building and the materialman will have to assume the burden of proving that it did, on account of this departure from the ordinary way of constructing the building and doing business.

The Court concludes the evidence will justify a finding, when Mr. Stewart testifies he did not furnish that cedar siding for the light-well and the lessees began to occupy the premises, that there was an abandonment in part of the plan, if it contemplated a heating plant and other features, not installed, and the adoption of different plans. The lessees had run out of money and couldn't complete this [203—179] building according to the lease, and it never has been completed. Certainly when they ran out of money and informed the materialman, that would be a hint to him to file a lien.

Findings and decree may be prepared for the defendant. [204—180]

I do hereby certify that I am the official court stenographer for the Third Judicial Division, District of Alaska; that as such official stenographer I reported the proceedings in the trial of the above-entitled cause, to wit—Arctic Lumber Co. vs. W. H. Borden et al. and that the above is a full, true and

correct transcript of the shorthand notes taken by me at said trial.

Dated at Valdez, Alaska, July 19, 1912.

I. HAMBURGER. [205]

[**Proceedings Re Settlement of Bill of Exceptions,
etc.**]

ARCTIC LUMBER CO.

vs.

BORDEN.

June 8, 1912.

Mr. BORYER.—Mr. Hamburger informs me that he will be unable to get out the evidence before your Honor leaves, and we want to enter into a stipulation now that he can certify instead of your Honor the bill of exceptions and that the matter may be so taken up and the formalities of the Court signing the bill of exceptions be waived and done away with.

By the COURT.—I think under that act, I don't remember the year, it must be an Act about the year 6 or 7, providing that where there is an official stenographer in attendance and the Judge who tried the case by death, removal or resignation is unable to officially certify to the bill of exceptions that his successor may do so on the report of the official stenographer; that if Judge Lyons is here by the time this record is out, it will be necessary possibly that something additional be included in the stipulation, that it is to be certified by some Judge or by my successor. If you are content with the stipulation, the Court now approves it.

Judge LYONS.—That will be satisfactory to us,

your Honor. We are willing to abide by the transcript as gotten out by the stenographer in the case, and of course when the succeeding [206] Judge comes along, whoever he may be—

By the COURT.—I think your stipulation would act as an agreed statement of facts and do away with all certificates, if you can put your stipulation in writing to make it broad enough.

Mr. BORYER.—I think we will have no trouble about that.

“I do hereby certify that the above is a transcript of my shorthand notes of above proceedings.

I. HAMBURGER,
Off. Court Reporter.” [207]

[Order Re Transcript on Appeal.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT, CHARLES
GOODALL, NORMAN McCAULEY and C.
W. PALMER,

Defendants.

CERTIFICATE OF COURT.

The foregoing Bill of Exceptions and Transcript of Evidence filed on the 14th day of May, A. D. 1913, consisting of 183 pages which Bill of Exceptions and

Transcript of Evidence, is duly certified by the official stenographer of this Court, contains all of the testimony and evidence taken and produced at the trial of the cause considered by the Court in rendering its decision, and constituted a part of this record in this cause and the exceptions therein set forth were duly taken, plaintiff and defendants, and allowed by the Court as they appear in said transcript except Plaintiff's Exhibits "A" to "V," inclusive, and Defendant's Exhibits "1" to "22," inclusive, which said Exhibits has by Order of this Court been ordered that said original Exhibits be sent to the Circuit Court of Appeals along with this Appeal, and the same are hereby made a part of the record of this appeal.

IT IS HEREBY ORDERED that the above Bill of Exceptions and transcript of evidence and the aforesaid exhibits be and the same are hereby constituted a part of the record in this cause on appeal.

PETER D. OVERFIELD,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 14, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [208]

*In the District Court for the Territory of Alaska,
Third Division.*

C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEO. K. GILBERT, and CHAS.
GOODALL,

Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 30th day of May, 1912, before the Court without a jury, the plaintiff appearing by itself and by its attorney, R. J. Boryer, Esq., and the defendant, W. H. Borden, appearing by himself and by his attorneys, Messrs. Brown & Lyons and E. E. Ritchie, Esq., and no other defendants in said cause appearing by answer, in person, by attorney or otherwise, and the Court having heard the testimony and proofs of the parties appearing in such action, and being fully advised in the premises, hereby makes the following Findings of Fact, to wit:

First: That the plaintiff, The Arctic Lumber Company, is a corporation organized under the laws of the State of Washington and authorized to transact business in the District of Alaska.

Second: That the defendant, W. H. Borden, is the owner of that certain lot or parcel of land known as lot 21 in block 2 of the town of Cordova, Alaska.

Third: That on or about the 17th day of February, 1910, the defendant, W. H. Borden, leased said [209] lot to the defendants, Norman McCauley and C. W. Palmer, for the full term of five years at an agreed rental of seventy-five dollars per month ground rent. That under the terms of said lease the said defendants, Norman McCauley and C. W. Palmer, were to erect a building 25 feet by one hundred feet on said lot, two stories in height, and that in case of default in the payment of rent or a violation of any covenant contained in said lease that same should be terminated and that the defendant, W. H. Borden, should go into possession thereof and become the owner of all buildings and other improvements erected or made on said property by the defendants, Norman McCauley and C. W. Palmer.

Fourth: That thereafter and on or about the 23d day of February, 1910, the defendant, Chas. Goodall, entered into a written contract with the defendants, Norman McCauley and C. W. Palmer, by the terms of which the said Goodall was to erect said building on said lot at the agreed price of \$1900.00.

Fifth: That on the 24th day of February, 1910, the defendant, W. H. Borden, posted a notice in a conspicuous place upon said lot notifying all persons that he would not be responsible for the expense of any construction, alterations or repairs incurred in the erection of said building or for any material used therein.

Sixth: The Court further finds that said building was completed by the defendant Goodall on the 14th day of April, 1910, the ground floor of which was

occupied at that time by the defendants, Norman McCauley and C. W. Palmer, and the second floor of which was occupied as a rooming-house by one Mrs. Mattern.

Seventh: That the lumber and building material used in the erection of said building was purchased by the [210] defendants, Norman McCauley and C. W. Palmer, from the plaintiff, the Arctic Lumber Company.

Eighth: That a materialman's or mechanic's lien was filed by said plaintiff on the 6th day of September, 1910, in the office of the Commissioner and Ex-officio Recorder at Cordova, Alaska, claiming a lien on the land and building described in plaintiff's complaint.

Ninth: That after the 14th day of April, 1910, up to and including the 6th day of August of the same year, the plaintiff furnished to the defendants, Norman McCauley and C. W. Palmer, small lots of lumber for the purpose of making alterations, changes and repairs in said building which were no part of the original plans of the same, *same*, but which arose after said building was completed on the said 14th day of April, 1910, and that plaintiff has not shown that the small lots of lumber alleged to have been delivered by it to the said defendants, Norman McCauley and C. W. Palmer, on the 8th day of July, 1910, and the 6th day of August of the same year were ever used in the construction of the said building or in the alteration or repair thereof.

Tenth: That a period of more than thirty days

had elapsed from the date of the completion of said building to the time of the filing of said lien in the Recorder's Office by the plaintiff.

Eleventh: That the said defendants, Norman McCauley and C. W. Palmer, after the execution of said lease abandoned the plan of installing a heating plant and other features in said building as provided in said lease and adopted different plans in accordance with the terms and plans set out in the written contract with the defendant Goodall.

Twelfth: The Court further finds that all the material allegations alleged in the answer of the [211] defendant Borden are true.

CONCLUSIONS OF LAW.

From the foregoing facts the Court finds as Conclusions of Law that the plaintiff is not entitled to the lien on the lands and premises described in the complaint or the building erected thereon by the lessees, Norman McCauley and C. W. Palmer, for the sum of money mentioned in the complaint of plaintiff or for any other sum whatever, either as against any interest which the said lessees have in said land or building on account of said lease or against the interest owned by the defendant, W. H. Borden, either in said land or building. And that said defendant, W. H. Borden, is entitled to a decree dismissing said action and to a judgment against the plaintiff for his costs incurred in same.

A Decree shall be entered accordingly.

Dated this 8th day of June, A. D. 1912.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal No. C. 1, page No. 312.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [212]

*In the District Court for the Territory of Alaska,
Third Division.*

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEO. K. GILBERT and CHAS.
GOODALL,

Defendants.

Decree.

This cause coming on regularly to be heard on the 30th day of May, 1912, before the above-entitled Court without a jury, upon the complaint of the plaintiff and the answer of the defendant W. H. Borden, and the reply thereto of the plaintiff, and the plaintiff appearing by itself and its attorney, R. J. Boryer, Esq., and the defendant W. H. Borden, appearing in person and by his attorneys, Messrs. Brown & Lyons and E. E. Ritchie, Esq., and no other defendants having appeared in said cause either by answer or otherwise, and the Court having heard the testimony of all the witnesses, both for the plaintiff and for the defendant W. H. Borden, together with the argument of counsel; and said case having been regularly submitted to the Court and being fully advised in the premises; the Findings of Fact

and Conclusions of Law having been filed herein from which it appears that the plaintiff is not entitled to the relief demanded in its complaint:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the lien sought to be foreclosed by the plaintiff in its complaint in this cause is not a [213] valid lien on the lands or premises described in said complaint or the building erected thereon by the said defendants, Norman McCauley and C. W. Palmer, for the sum of money alleged in the complaint to be due the plaintiff, or for any sum whatever.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff has no lien on said lands or premises or said building either as against any interest which the said lessees, Norman McCauley and C. W. Palmer, may have in said land or building on account of said lease or otherwise; or against the interest owned by the defendant W. H. Borden either in said land or said building or otherwise.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said action be and the same is hereby dismissed and that judgment be entered against the plaintiff in favor of the defendant W. H. Borden for his costs and disbursements in this suit.

Dated at Valdez, Alaska, this 8th day of June, 1912.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal No. C. 1, page No. 314.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [214]

*In the District Court for the Territory of Alaska,
Third Division.*

C. #11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, G. K. GILBERT and CHARLES
GOODALL,

Defendants.

**Plaintiff's Objections to Defendant's Offered
Findings and Conclusions.**

Plaintiff, by its attorney, objects to findings of facts and conclusions of law offered herein by defendant upon the following grounds:

I.

Objects to findings #3 offered by W. H. Borden, defendant, for reason said finding does not contain or set out the covenants of said lease regarding the construction of said building as to how it was to be completed.

II.

Objects to finding #4, for the reason said contract only provided for the erection or construction of the woodwork for said building and not the completion of said building.

III.

Objects to finding #5, for the reason the evidence does not show that said notice was posted in a conspicuous place upon the lot and does not contain or set out the notice and other conditions of said notice.

IV.

Objects to finding #6, for the reason the [215] evidence does not show said building was completed on the 14th day of April, 1910.

V.

Objects to finding #9, for the reason the evidence does not support such finding.

VI.

Objects to finding #10, for the reason the evidence does not support said finding and it is contrary to the evidence and law.

VII.

Objects to finding #11 for reason said finding is not supported by the evidence and is contrary to the evidence of said case.

VIII.

Objects to finding #12 for reason said finding is contrary to evidence.

IX.

Objects to conclusion for the reason that same is against the law and evidence of the case.

R. J. BORYER,

Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [216]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, G. K. GILBERT, and CHARLES
GOODALL,

Defendants.

**Plaintiff's Proposed Findings of Fact and
Conclusions of Law.**

This cause having been called for trial before the Court, R. J. Boryer appearing as attorney for plaintiff and Lyons and Ritchie appearing for the defendant W. H. Borden, the other defendants, Norman McCauley and C. W. Palmer and Charles Goodall, not having made any appearance or filed any pleadings, and defendant G. K. Gilbert having failed to answer, and the Court having heard the proofs of the respective parties and considered the same, and the records and papers in the cause and the arguments of the respective attorneys for the plaintiff and defendant W. H. Borden thereon, and the cause having been submitted to the Court for its decision, the Court now finds the following facts:

I.

That the plaintiff is a corporation duly and regularly organized and existing under the laws of the State of Washington and has complied with all of

the laws in the District of Alaska pertaining to foreign corporations doing business in Alaska, and is entitled to do business in Alaska.

II.

That on the 17th day of February, A. D. 1910, W. H. Borden was the owner of lot 21 block 2 of the town of Cordova, Alaska, and on the 17th day of February, A. D. 1910, said W. H. Borden [217] made and entered into a written contract or lease with N. D. McCauley and C. W. Palmer, wherein W. H. Borden leased to M. D. McCauley and C. W. Palmer lot 21 block 2 of the town of Cordova, Alaska, for a period of 5 years from the first day of April, 1910, at a monthly rental of \$75.00. The said W. H. Borden was to grade said lot and construct a good suitable foundation for a building two stories and a basement in height, to cover the entire lot; the expense of grading said lot and construction of said foundation to be paid by W. H. Borden. N. D. McCauley and C. W. Palmer agreed to at once commence and fully finish a building on said lot at their own expense to be 25 ft. x 100 ft. in size and two stories and a basement in height, and to wire same for electric lights and telephone, and to equip same with steam heat and radiators, which said steam-heating plant was to be furnished either by a boiler in the building or from and through steam-pipes from outside the building, and it was agreed that the heating plant and appliances, including radiators and wiring and plumbing, was considered a part of the building and not to be removed therefrom, and N. D. McCauley and C. W. Palmer agreed with W. H.

Borden to pay for all labor in the construction of said building and protect the property from any lien on account of said building, and their failure to do so shall at the option of W. H. Borden terminate the contract or lease, and it was further agreed in said contract or lease that N. D. McCauley and C. W. Palmer would not remove any building or permanent improvements from said lot during the life of the lease or contract, and at the termination or expiration of the lease or contract N. D. McCauley and C. W. Palmer agreed to quietly and peacefully surrender the possession of the premises to W. H. Borden, his heirs and assigns, together with the building thereon, and all improvements, including steam-heating appliances, plumbing, toilets, wash-basins, etc., and wiring.

III.

That on the 17th day of February, 1910, W. H. Borden [218] begun the construction of the foundation for the building to be constructed on lot 21, Block 2 of the town of Cordova, Alaska, upon which foundation N. D. McCauley and C. W. Palmer were to erect and construct a building having two stories and a basement in height to cover entire lot and to put therein a steam-heating plant. That said foundation was practically completed on the night of the 23d day of February, A. D. 1910, and fully completed on the 24th day of February, A. D. 1910.

IV.

That between the 17th day of February and the 23d day of February, A. D. 1910; W. H. Borden notified the plaintiff, The Arctic Lumber Company,

that he had entered into a contract with N. D. McCauley and S. W. Palmer, wherein and whereby McCauley and Palmer were to construct a building on his lot 21 of block 2 of the town of Cordova.

V.

That between the 17th and 23d day of February, A. D. 1910, N. D. McCauley represented to the Arctic Lumber Company that he was going to construct on lot 21 block 2 of the town of Cordova a building having two stories and a basement in height to cover entire lot and to construct and equip said building with a steam-heating plant, and to arrange and fix the basement for a skating rink, the upper part of said building to be fitted up for a place for the retail and wholesale of liquors and the upper story for living apartments. And the plaintiff, Arctic Lumber Company, at this time, entered into an agreement with N. D. McCauley to furnish him with building material to construct and erect the building on said lot at an agreed or stated price.

VI.

That the Arctic Lumber Company, pursuant to its contract with N. D. McCauley to furnish building material [219] for the construction of a house on lot 21 block 2 of the town of Cordova, Alaska, begun on the 23d day of February, A. D. 1910, to furnish building material therefore.

VII.

That on the 24th day of February, A. D. 1910, about 3 o'clock in the afternoon, W. H. Borden posted on the outer side of a post, which post forms and is a part of the foundation that was to be con-

structed by him, and which post is located on the left side of the foundation and is a part of said foundation, which post is between 40 and 50 feet from the point of the building or street in front of said building and the only street accessible at that time for the delivery of materials to said lot. That said notice was in the following words:

NOTICE REGARDING MECHANICS' LIENS.

I, W. H. Borden, the owner of the lot upon which this foundation structure stands, being lot No. 21, in Block 2 of the town of Cordova, Alaska, and the owner of this foundation structure thereon and the owner of an interest in the building and improvements to be placed thereon, to wit: the entire ownership of said building and improvements from and after the termination of a certain lease dated February 17th, 1910, and running not longer than April 1st, 1915, subject to all the terms of said lease, **HEREBY GIVE NOTICE** that I will not be responsible for any construction, alteration or repair had or done on said lot or structure, or for any material or work or labor thereon or therefore.

Dated February 24th, 1910.

W. H. BORDEN,

Owner of said property and interest.

VIII.

That the contract referred to in the notice posted on the foundation of the house on lot 21 block 2 of Cordova, Alaska, referred to the contract or lease entered into [220] between W. H. Borden and N. McCauley and C. W. Palmer on the 17th day of February, A. D. 1910, for the construction of said build-

ing, which contract was not placed or filed for record until the first day of March, A. D. 1910.

IX.

That the street and sidewalk in front of said lot is about 20 feet above the lot and said notice posted on the foundation could not be read from the street or sidewalk, and in order to read said notice it was necessary to enter and go upon the adjoining improved property, not owned by either the plaintiff or defendants, which property adjoins lot 21, block 2, on the opposite side of lot 21, block 2, in front of and under the street sidewalk that was in a dangerous condition, and after crossing said lot, go upon the adjoining lot not owned by either the plaintiff or defendants and walk on said adjoining lot between 40 and 50 feet to the point where said notice was posted; or said notice could be read by going down on to the foundation and holding on to a timber or other object and leaning over beyond the foundation with the body and head with feet and hands on the foundation.

X.

That on the 1st day of March, A. D. 1910, the defendant, W. H. Borden, after the plaintiff had furnished building and other material to the amount of \$1,008.16 for the house on lot 21, block 2 of Cordova, Alaska, wrote the plaintiff a letter which was received, advising plaintiff that the defendant, W. H. Borden, would not be responsible for building material furnished N. D. McCauley and C. W. Palmer.

XI.

That W. H. Borden was around and about said

lot from the 17th day of February, A. D. 1910, to and including the first day of March, A. D. 1910, knew the material was being delivered for the construction of said house, and said house being constructed from the 17th day of February, A. D. 1910, and did not between said dates notify the plaintiff of said notice or that he would not be responsible for the material furnished. [221]

XII.

That the foundation for said house was completed on the 23d or 24th day of February, A. D. 1910, and the superstructure of the building was begun on the 24th day of February, A. D. 1910.

XIII.

That the plaintiff furnished the building material for the construction of the foundation for said building, which building material was paid for by W. H. Borden on the first day of March, A. D. 1910.

XIV.

That the plaintiff began furnishing building material for the construction of the building of said house on the 23d day of February, A. D. 1910, and continued furnishing material up to and including the 13th day of April, A. D. 1910, amounting to \$——, all of which material was delivered to and used in the construction and erection of the building or superstructure built upon the foundation on lot 21, block 2 of the town of Cordova, Alaska.

XV.

That the plaintiff during the month of April, namely, from the 21st day of April, A. D. 1910, to and including the 30th day of April, A. D. 1910, de-

livered building material at the request of N. D. McCauley to the building on lot 21, block 2 of Cordova, for the purpose of being used in said building, said material being furnished on the following dates and used for following purposes:

April 21st, A. D. 1910, building material costing \$1.11, used in the construction of said building.

April 22d, A. D. 1910, building material, the price of which was \$46.17, used in building a platform connected with building and in the rear of said building.

April 25, A. D. 1910, building material, the price of which was \$9.45, used for the construction of [222] stairs in the rear of said building.

April 25th, A. D. 1910, building material, the price of which was \$7.20, used in the construction of building a stairs in the rear of said building.

April 26th, A. D. 1910, building material, the price of which was \$1.26, used in the construction of said building.

April 30th, A. D. 1910, building material, the price of which was \$1.35, used in the construction of said building.

XVI.

That the plaintiff during the month of May, A. D. 1910, delivered building material at the request of N. D. McCauley, to the building on lot 21, block 2 of the town of Cordova, Alaska, for the purpose of being used on said building, said materials being furnished on the following dates and used for the following purposes:

May 20th, A. D. 1910, material costing \$2.40 used

in putting in shelves in the living apartments of said building.

May 30th, A. D. 1910, material costing \$1.75 used in the construction of said building.

XVII.

That the plaintiff during the month of June, A. D. 1910, delivered building material at the request of N. D. McCauley, to the building on lot 21, block 2 of Cordova, Alaska, for the purpose of being used in said building, said material being furnished on the following dates and used for the following purposes:

June 2, A. D. 1910, building material, the price of which was \$12.93, used for the construction and extending of shelving in said building.

June 2, A. D. 1910, material, the price of which was \$2.53, used in making additional section for enlarging [223] office in said building.

June 3, A. D. 1910, building material, the price of which was \$3.05, used in making additional section for enlarging office in said building.

June 4, A. D. 1910, material, the price of which was 54¢ used for making additional section for enlarging office in said building.

June 10, A. D. 1910, material, the price of which was \$2.14 used for constructing a counter in said building.

June 1, A. D. 1910, material, the price of which was \$5.13 used for the constructing a show or display window.

XVIII.

That the plaintiff during the month of July, A. D.

1910, delivered building material on July 8th, 1910, at the request of N. D. McCauley, to the building on lot 21, block 2 of Cordova, for the purpose of being used in said building, said materials costing 24¢.

XIX.

That the plaintiff on the 6th day of August, A. D. 1910, delivered building material at the request of N. D. McCauley to the building on lot 21, block 2 of Cordova, for the purpose of being used in said building on said lot, said material costing \$3.00.

XX.

That the price for all of the materials furnished for the construction of the building on lot 21, block 2 of Cordova, by the Arctic Lumber Company, was and is after deducting all credit \$2,236.57, which amount remains unpaid.

XXI.

That the Arctic Lumber Company on the 6th day of September, A. D. 1910, filed for record in the office [224] of the Recorder of Cordova, Recording Precinct, its claim of lien verified, the precinct in which lot 21, block 2 of Cordova, Alaska, is located, which claim or lien was recorded in book 1 of liens, page 488, in the said recording precinct, and that plaintiff began its action to foreclose said claim on lien within six months from the filing and recording of same.

XXII.

That the defendant N. D. McCauley represented to the Arctic Lumber Company as late as August 6th, A. D. 1910, that he had not completed the house

he was building, on lot 21, block 2 of Cordova, Alaska, and represented that said house was not completed as late as August 6th, A. D. 1910.

XXIII.

That the steam-heating plant called for and specified in the contract between W. H. Borden and N. D. McCauley and C. W. Palmer entered into on the 17th day of February, A. D. 1910, for the construction of the building on lot 21, block 2 of Cordova, Alaska, was not put in said building as late as August 6th, A. D. 1910, and said building was only painted on the front end or the end of the building facing the street.

XXIV.

That the defendant, W. H. Borden, on or about the first day of October, A. D. 1910, declared the lease or contract entered into between W. H. Borden and N. D. McCauley and C. W. Palmer, on the 17th day of February, A. D. 1910, for the leasing of lot 21, block 2, and the erection of said building, forfeited for failure of defendants, N. D. McCauley and C. W. Palmer to keep and perform the covenants contained in said contract or lease, and said defendant, W. H. Borden, took possession of said property including the house erected thereon, and ever since has held possession of same and collected the rents from same. [225]

XXV.

That the building on lot 21, block 2 of Cordova, Alaska, was not completed on the 6th day of September, A. D. 1910, when plaintiff filed its lien.

XXVI.

That the plaintiff paid a necessary expense for filing its claim of lien 36 cents and \$25.00 for drawing of said lien.

XXVII.

That the sum of \$300.00 is a reasonable attorney fee to be allowed plaintiff in this action for legal services.

XXVIII.

That the claim or interest of defendant, W. H. Borden, in or to said lot 21, block 2 is subject to and subsequent to the lien and claim of the plaintiff.

XXIX.

That the claim or interest of defendants, W. H. Borden, N. D. McCauley, C. W. Palmer, Charles Goodall and George Gilbert, in and to the building erected on lot 21, block 2 is subject to and subsequent to the lien claim of the plaintiff.

XXX.

That the defendants, N. D. McCauley and C. W. Palmer, did not at any time and has not surrendered to defendant, W. H. Borden, their leasehold or interest in and to lot 21, block 2 of the town of Cordova, Alaska, and the building erected thereon, and that *possess* of said property was taken by W. H. Borden or his agent, without securing the consent of N. D. McCauley and C. W. Palmer.

XXXI.

That the defendant, W. H. Borden, has never taken any legal steps or instituted any legal proceedings for the purpose of declaring the lease or contract forfeited between W. H. Borden and N. D.

McCauley and C. W. Palmer for lot 21, block 2, [226] and the house erected thereon, which lease was made and executed on the 17th day of February, A. D. 1910, between the above parties.

XXXII.

That the defendant, W. H. Borden, begun the construction of the building on lot 21, block 2, of the town of Cordova, Alaska, on the 17th day of February, A. D. 1910, at the time of beginning the foundation of said building.

XXXIII.

That the notice posted by W. H. Borden, on the 24th day of February, A. D. 1910, was not posted in a conspicuous place upon the land or upon the building or improvement for which the plaintiff furnished the building material, namely, the structure or building on lot 21, block 2 of the town of Cordova, Alaska.

XXXIV.

That the claim of lien of the Arctic Lumber Company was filed within 30 days prior to the completion of the building for which the material were furnished on lot 21, block 2, of the town of Cordova, Alaska.

XXXV.

That the defendant, N. D. McCauley, at all times from the beginning of the construction of said building and the furnishing of the material by the plaintiff for said building up to and including the 6th day of September, 1910, represented to the plaintiff that said building was not completed and purchased building material from the plaintiff up to and includ-

ing the 6th day of August, A. D. 1910, representing that said building material was to be used and was for the construction of the aforesaid house. [227]

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts, the Court hereby finds and decides:

I.

That it is due and owing the plaintiff, The Arctic Lumber Company, \$2,236.57 for lumber and building materials, furnished and delivered to lot 21, block 2, of the town of Cordova, Alaska, at the request of N. D. McCauley for the construction and erection of the house or building constructed on said lot and block.

II.

That the plaintiff, Arctic Lumber Company, is entitled to a decree establishing their lien for the sum of \$2,236.57 upon lot 21, block 2, of the town of Cordova, Alaska, and the building erected thereon, and such further amount to include their expenses and costs in this suit.

And judgment is hereby ordered to be entered accordingly.

Dated this — day of June, A. D. 1912.

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [228]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, G. K. GILBERT, and CHARLES
GOODALL,

Defendants.

**Exceptions of Plaintiff to Findings of Fact and
Conclusions of Law, Signed.**

I.

Comes now the plaintiff, The Arctic Lumber Company, and excepts to the findings of fact #3 made by the Court herein, upon the ground and for the reason that said finding does not contain or set up the covenants of said lease regarding the construction of said building as to how it was to be completed.

II.

Objects to finding #4 made by the Court, for the reason that said contract only provided for the erection or the construction or finishing of the woodwork for said building and not for the completion of said building in the manner said building was to be completed as per the contract or lease entered into on the 17th day of February, A. D. 1910, by and between W. H. Borden and N. D. McCauley and C. W. Palmer.

III.

Objects to finding #3 made by the Court, for the reason that the evidence does not show that said notice was posted in a conspicuous place upon the lot and does not contains or set out the notice and conditions contained in said notice.

IV.

Objects to finding #6 as made by the Court, for [229] the reason that the evidence does not show that said building was completed on the 14th day of April, A. D. 1910.

V.

Objects to finding #9 made by the Court, for the reason that the evidence does not support such finding.

VI.

Objects to finding #10 made by the Court, for the reason that the evidence does not support said finding and is contrary to the evidence and law.

VII.

Objects to finding #11 made by the Court, for the reason that said finding is not supported by the evidence and is contrary to the evidence in this case.

VIII.

Objects to finding #12 made by the Court, for the reason that said finding is contrary to the evidence.

IX.

Objects to the conclusions made by the Court, for the reason that same is against the law and evidence of the case.

R. J. BORYER,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [230]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, G. K. GILBERT, and CHARLES
GOODALL,

Defendants.

**Plaintiff's Exceptions to Refusal of Court to Make
Findings and Conclusions Offered by Plaintiff.**

Plaintiff, The Arctic Lumber Company, by its attorney, R. J. Boryer, makes the following exceptions for the Arctic Lumber Company to the Court's refusal to accept Plaintiff's Proposed Findings of Fact and Conclusions of Law, tendered to the Court, in this case by the plaintiff's attorney, as follows, to wit:

I.

In the refusal of the Court to make findings of fact #2 as offered and tendered by the Arctic Lumber Company.

II.

In the refusal of the Court to make finding of fact #3 as offered and tendered by the Arctic Lumber Company.

III.

In the refusal of the Court to make findings of fact #4 as offered and tendered by the Arctic Lumber Company.

IV.

In the refusal of the Court to make findings of fact #5 as offered and tendered by the Arctic Lumber Company.

V.

In the refusal of the Court to make finding of fact #6 as offered and tendered by the Arctic Lumber Company. [231]

VI.

In the refusal of the Court to make finding of fact #7 as offered and tendered by the Arctic Lumber Company.

VII.

In the refusal of the Court to make findings of fact #8 as offered and tendered by the Arctic Lumber Company.

VIII.

In the refusal of the Court to make finding of fact #9 as offered and tendered by the Arctic Lumber Company.

IX.

In the refusal of the Court to make finding of fact #10 as offered and tendered by the Arctic Lumber Company.

X.

In the refusal of the Court to make finding of fact #11 as offered and tendered by the Arctic Lumber Company.

XI.

In the refusal of the Court to make finding of fact #12 as offered and tendered by the Arctic Lumber Company.

XII.

In the refusal of the Court to make finding of fact #13 as offered and tendered by the Arctic Lumber Company.

XIII.

In the refusal of the Court to make finding of fact #14 as offered and tendered by the Arctic Lumber Company.

XIV.

In the refusal of the Court to make finding of fact #15 as offered and tendered by the Arctic Lumber Company.

XV.

In the refusal of the Court to make finding of fact #16 as offered and tendered by the Arctic Lumber Company.

XVI.

In the refusal of the Court to make finding of fact #17 as offered and tendered by the Arctic Lumber Company. [232]

XVII.

In the refusal of the Court to make finding of fact #18 as offered and tendered by the Arctic Lumber Company.

XVIII.

In the refusal of the Court to make finding of fact #19 as offered and tendered by the Arctic Lumber Company.

XIX.

In the refusal of the Court to make findings of fact #20 as offered and tendered by the Arctic Lumber Company.

XX.

In the refusal of the Court to make finding of fact #21 as offered and tendered by the Arctic Lumber Company.

XXI.

In the refusal of the Court to make finding of fact #22 as offered and tendered by the Arctic Lumber Company.

XXII.

In the refusal of the Court to make finding of fact #23 as offered and tendered by the Arctic Lumber Company.

XXIII.

In the refusal of the Court to make finding of fact #24 as offered and tendered by the Arctic Lumber Company.

XXIV.

In the refusal of the Court to make finding of fact #25 as offered and tendered by the Arctic Lumber Company.

XXV.

In the refusal of the Court to make finding of fact #26 as offered and tendered by the Arctic Lumber Company.

XXVI.

In the refusal of the Court to make finding of fact #27 as offered and tendered by the Arctic Lumber Company.

XXVII.

In the refusal of the Court to make finding of fact #28 as offered and tendered by the Arctic Lumber Company.

XXVIII.

In the refusal of the Court to make finding of [233] fact #29 as offered and tendered by the Arctic Lumber Company.

XXIX.

In the refusal of the Court to make finding of fact #30 as offered and tendered by the Arctic Lumber Company.

XXX.

In the refusal of the Court to make finding of fact #31 as offered and tendered by the Arctic Lumber Company.

XXXI.

In the refusal of the Court to make finding of fact #32 as offered and tendered by the Arctic Lumber Company.

XXXII.

In the refusal of the Court to make finding of fact #33 as offered and tendered by the Arctic Lumber Company.

XXXIII.

In the refusal of the Court to make finding of fact #34 as offered and tendered by the Arctic Lumber Company.

XXXIV.

In the refusal of the Court to make finding of fact #35 as offered and tendered by the Arctic Lumber Company.

TO CONCLUSIONS OF LAW.

In the refusal of the Court to make the conclusions of law as set out in paragraphs 1 and 2 of the plaintiff's proposed findings of fact and conclusions of Law.

All of which said exceptions are this date by the Court allowed.

Dated this the 8th day of June, A. D. 1912.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [234]

*In the District Court for the Territory of Alaska,
Third Division.*

C. No. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEO. K. GILBERT, and CHAS.
GOODALL,

Defendants.

Motion for a New Trial.

Comes now the plaintiff by its attorney, and moves the Court for a new trial in the above-entitled action, for the reason that the decree in said action is contrary and not in accordance and against the

law and evidence in this action.

R. J. BORYER,

Attorney for Plaintiff.

This is to certify that the above is a true and correct copy of the original motion herein.

Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [235]

*In the District Court for the Territory of Alaska,
Third Division.*

C. No. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

NORMAN McCAULEY, C. W. PALMER, W. H.
BORDEN, GEO. K. GILBERT, and CHAS.
GOODALL,

Defendants.

Order Denying Motion for New Trial.

Plaintiff's motion in the above-entitled cause for a new trial in the above-entitled action, having come on to be heard this day, plaintiff appearing by its attorney, R. J. Boryer, and defendant appearing by Brown & Lyons, the same having been argued and duly considered by the Court,

IT IS HEREBY ORDERED, ADJUDGED AND

DECREED that said motion for a new trial be and the same is hereby denied.

Signed this 8th day of June, A. D. 1912.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal No. C. 1, page 317.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [236]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT, CHARLES
GOODALL, NORMAN McCAULEY, and C.
W. PALMER,

Defendants.

Petition for Appeal and Order Allowing Appeal.

To the Honorable PETER D. OVERFIELD, District Judge:

The Arctic Lumber Company, a corporation, plaintiff herein, feeling itself aggrieved by the Decree made and entered in this cause on the 8th day of June, A. D. 1912, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith and prays that

this, its appeal, be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and desiring to supersede the execution of the Decree the petitioner, Arctic Lumber Company, here tenders bond in such amount as Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

R. J. BORYER,

Attorney, Cordova, Alaska.

KERR & McCORD,

Attorneys, Seattle, Washington.

And now, to wit, on the 14th day of May, A. D. 1913,—

IT IS ORDERED that the appeal be allowed as prayed for, and said appeal shall operate as a supersedeas upon the [237] petitioner filing a bond in the sum of Five Hundred Dollars, with sufficient sureties.

PETER D. OVERFIELD,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 14, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.
[238]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT, CHARLES
GOODALL, NORMAN McCAULEY, and C.
W. PALMER,

Defendants.

Assignment of Errors.

Comes now the Plaintiff, Arctic Lumber Company, in case #C. 11, appellant herein and files the following assignment of errors upon which it will rely on its appeal from the judgment made by this Honorable Court on the 8th day of June, A. D. 1912, in the above-entitled cause:

I.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #2, for the reason that the lease between W. H. Borden and Norman McCauley and C. W. Palmer, which lease was admitted in evidence, expressly provided the facts set out in plaintiff's instruction #2, and was the best evidence to determine when said building was completed as to the understanding with W. H. Borden and Norman McCauley and the understanding between McCauley and the plaintiff; said instruction being as follows:

“That on the 17th day of February, A. D. 1910, W. H. Borden was the owner of lot 21, block 2 of

the Town of Cordova, Alaska, and on the 17th day of February, A. D. 1910, said W. H. Borden made and entered into a written contract [239] or lease with Norman McCauley and C. W. Palmer, wherein W. H. Borden leased to Norman McCauley and C. W. Palmer lot 21, block 2 of the town of Cordova, Alaska, for a period of 5 years from the first day of April, 1910, at a monthly rental of \$75.00. The said W. H. Borden was to grade said lot and construct a good suitable foundation for a building two stories and a basement in height, to cover the entire lot; the expense of grading said lot and construction of said foundation to be paid by W. H. Borden. Norman McCauley and C. W. Palmer agreed to at once commence and fully finish a building on said lot at their own expense, to be 25x100 ft. in size and two stories and a basement in height, and to wire same for electric lights and telephone, and to equip same with steam heat and radiators, which said steam-heating plant was to be furnished either by a boiler in the building or from and through steam pipes from outside the building, and it was agreed that the heating plant and appliances, including radiators and wiring and plumbing, was considered a part of the building and not to be removed therefrom, and Norman McCauley and C. W. Palmer agreed with W. H. Borden to pay for all labor in the construction of said building and protect the property from any lien on account of said building, and their failure to do shall at the option of W. H. Borden terminate the contract or lease, and it was further agreed in said contract or lease that

Norman McCauley and C. W. Palmer would not remove any building or permanent improvements from said lot during the life of the lease or contract, and at the termination or expiration of the lease or contract Norman McCauley and C. W. Palmer agreed to quietly and peacefully surrender the possession of the premises to W. H. Borden, his heirs, and assigns, together with the building thereon and all improvements including steam-heating appliances, plumbing, toilets, wash-basins, etc., and wiring.”

[240]

II.

The Court erred in refusing to adopt Plaintiff's *Find of Fact #3*, for the reason that the evidence clearly shows that W. H. Borden did construct on Lot 21, Block 2, the foundation for a building upon which McCauley and Palmer were to construct a building and were to put therein a steam-heating plant, and for the further reason the evidence shows that said foundation was practically completed on the night of the 23d of February, 1910, and fully completed on the 24th day of February, 1910; which instruction is as follows:

“That on the 17th day of February, 1910, W. H. Borden begun the construction of the foundation for the building to be constructed on lot 21, Block 2 of the town of Cordova, Alaska, upon which foundation Norman McCauley and C. W. Palmer were to erect and construct a building having two stories and a basement in height to cover the entire lot and to put therein a steam-heating plant. That said foundation was practically completed on the night of the

23d of February, A. D. 1910, and fully completed on the 24th day of February, A. D. 1910.”

III.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #4, for the reason that the evidence clearly shows that W. H. Borden did between the 17th day and 23d day of February, 1910, notify the plaintiff, Arctic Lumber Company, that he had entered into a contract with Norman McCauley and C. W. Palmer wherein and whereby McCauley and Palmer were to construct a building on lot 21 Block 2 of the Town of Cordova, a copy of which instruction is as follows:

“That between the 17th day of February and the 23d day of February, A. D. 1910, W. H. Borden notified the plaintiff, Arctic Lumber Company, that he had entered into a contract with Norman McCauley and C. W. Palmer wherein and whereby McCauley and Palmer were to construct a building on his lot 21 of block 2 of the town of Cordova.” [241]

IV.

That the Court erred in refusing to adopt Plaintiff's Finding of Fact #5, for the reason that the uncontradicted evidence in the case shows that between the 17th day and the 23d day of February, 1910, Norman McCauley represented to the Arctic Lumber Company that he was going to construct on lot 21, block 2, a two-story building with basement and equip said building with steam-heating plant before said building was completed; which instruction is as follows:

“That between the 17th and 23d day of February,

A. D. 1910, N. D. McCauley represented to the Arctic Lumber Company that he was going to construct on lot 21, block 2 of the town of Cordova, a building having two stories and a basement in height to cover entire lot and to construct and equip said building with a steam-heating plant, and to arrange and fix the basement for a skating rink, the upper part of said building to be fitted up for a place for the retail and wholesale of liquors and the upper story for living apartments. And the plaintiff, Arctic Lumber Company, at this time, entered into an agreement with N. D. McCauley to furnish him with building material to construct and erect the building on said lot at an agreed or stated price.”

V.

Court erred in refusing to adopt Plaintiff’s Finding of Fact #6, for the reason that the Arctic Lumber Company did furnish building material for the construction of the building on said lot 21, block 2, and begun the furnishing of said lumber on the 23d day of February, 1910; which instruction is as follows:

“That the Arctic Lumber Company, pursuant to its contract with N. D. McCauley to furnish building material for the construction of a house on lot 21, block 2, of the town of Cordova, Alaska, begun on the 23d day of February, A. D. 1910, to furnish building material therefor.”

VI.

That the Court erred in refusing to adopt [242] Plaintiff’s Finding of Fact #7, for the reason that the evidence clearly shows that the post upon which

the notice was posted is between 40 and 50 feet from the point of the building or street where materials could be delivered, and for the further reason that the notice posted on said building concedes that W. H. Borden was an owner or had an interest in the building and improvements to be placed on said lot and on said foundation at the time said notice was posted thereon; which instruction is as follows:

“That on the 24th day of February, A. D. 1910, about 3 o'clock in the afternoon, W. H. Borden, posted on the outer side of a post, which post forms and is a part of the foundation that was to be constructed by him, and which post is located on the left side of the foundation and is a part of said foundation, which post is between 40 and 50 feet from the point of the building or street in front of said building and the only street accessible at that time for the delivery of materials to said lot, that said notice was in the following words:

“ ‘I, W. H. Borden, the owner of the lot upon which this foundation structure stands, being Lot No. 21, in block 2 of the town of Cordova, Alaska, and the owner of this foundation structure thereon and the owner of an interest in the building and improvements to be placed thereon, to wit: the entire ownership of said building and improvements from and after the termination of a *cert lease* dated February 17th, 1910, and running not longer than April 1st, 1915, subject to all the terms of said lease, **HEREBY GIVE NOTICE** that I will not be responsible for any construction, alteration, or repair had or done on said lot or structure, or for any material

or work or labor thereon or therefor. Dated February 24th, 1910.

W. H. BORDEN,
Owner of said property and interest.' "

VII.

The Court erred in refusing to adopt Plaintiff's Finding of Fact No. 8, for the reason that the evidence shows that the contract referred to in the notice contained in Plaintiff's Instruction No. 7, was not placed on file for record until the first day of March, 1910,—6 days after the plaintiff had [243] begun furnishing material, which instruction is as follows:

“That the contract referred to in the notice posted on the foundation of the house on lot 21, block 2 of Cordova, Alaska, referred to the contract or lease entered into between W. H. Borden and N. McCauley and C. W. Palmer, on the 17th day of February, A. D. 1910, for the construction of said building, which contract was not placed or filed for record until the first day of March, A. D. 1910.

VIII.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #9, for the reason that the evidence shows that the point or place where said notice was posted could not be read from the street or sidewalk where said lumber was delivered, and it was necessary to go on adjoining property not owned by the defendants, in order to read said notice; which instruction is as follows:

“That the street and sidewalk in front of said lot is about 20 feet above the lot and said notice posted

on the foundation could not be read from the street or sidewalk and in order to read said notice it was necessary to enter and go upon the adjoining improved property, not owned by either the plaintiff or defendants, which property adjoins lot 21, block 2 on the opposite side of lot 21, block 2 in front of and under the street and sidewalk that was in a dangerous condition, and after crossing said lot, go upon the adjoining lot not owned by either the plaintiff or defendants and *alk* on said adjoining lot between 40 and 50 feet to the point where said notice was posted; or said notice could be read by going down on the foundation and holding on to a timber or other object and leaning over beyond the foundation with the body and head with feet and hand on the foundation.”

IX.

The Court erred in refusing to adopt [244] Plaintiff's Finding of Fact #10, for the reason that the evidence shows that W. H. Borden was present when the material was furnished by the plaintiff, and did not call the plaintiff's attention to said notice or otherwise advise plaintiff that he would not be responsible for the material furnished until the first day of March, A. D. 1910, at which time the plaintiff had furnished material to the amount of \$1008.16, which instruction is as follows:

“That on the 1st day of March, A. D. 1910, the defendant, W. H. Borden, after the plaintiff had furnished building and other material to the amount of \$1008.16 for the house on lot 21, block 2, of Cordova, Alaska, wrote the plaintiff a letter which was re-

ceived, advising plaintiff that the defendant, W. G. Borden, would not be responsible for building material furnished N. D. McCauley and C. W. Palmer.”

X.

The Court erred in refusing to adopt Plaintiff's Finding of Fact # 12, for the reason that the evidence shows that the foundation was completed on the 23d or 24th day of February, 1910, and the superstructure or upper stories were begun on the 24th day of February, 1910, which proposed instruction was as follows:

“That the foundation for said house was completed on the 23d or 24th day of February, A. D. 1910, and the superstructure of the building was begun on the 24th day of February, A. D. 1910.”

XI.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #13, for the reason that the evidence shows that the defendant, W. H. Borden, did on the first day of March, 1910, pay for material furnished for the construction of the foundation of said building, which instruction is as follows:

“That the plaintiff furnished the building material for the construction of the foundation for said building which [245] building material was paid for by W. H. Borden on the first day of March, A. D. 1910.”

XII.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #14, for the reason that the evidence shows that the plaintiff did begin and furnish material for said house on the 23d day of February,

1910, and continued furnishing material up to and including the 13th day of April, 1910, which material was used in the construction of the upper structure of said building; which instruction is as follows:

“That the plaintiff begun *furnish* building material for the construction of the building of said house on the 23d day of February, A. D. 1910, and continued *furnish* material up to and including the 13th day of April, A. D. 1910, amounting to \$——, all of which material was delivered to and used in the construction and erection of the building or superstructure built upon the foundation of lot 21, block 2 of the Town of Cordova, Alaska.”

XIII.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #15, for the reason that the evidence shows that the plaintiff during the month of April delivered building material at the request of Norman McCauley to the building on Lot 21, block 2 of the Town of Cordova, for the purpose of being used on said building, and also used in the construction of said building prior to its completion; which instruction is as follows:

“That the plaintiff during the month of April, namely, from the 21st day of April, A. D. 1910, to and including the 30th day of April, A. D. 1910, delivered building material at the request of N. D. McCauley to the building on lot 21, block 2 of Cordova, for the purpose of being used in said building, said material being furnished on the following dates and used for the [246] following purposes:

“April 21st, A. D. 1910, building material, costing

\$1.11, used in construction of said building.

“April 22d, A. D. 1910, building material, the price of which was \$46.17, used in building a platform connected with building and in the rear of said building.

“April 25, A. D. 1910, building material, the price of which was \$9.45, used for the construction of stairs in the rear of said building.

“April 25th, A. D. 1910, building material, the price of which was \$7.20, used in the construction of building a stairs in the rear of said building.

“April 26th, A. D. 1910, building material, the price of which was \$1.26 used in the construction of said building.

“April 30th, A. D. 1910, building material, the price of which was \$1.35, used in the construction of said building.”

XIV.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #16, for the reason that the evidence shows that the plaintiff during the month of May, 1910, delivered building material at the request of Norman McCauley for said building for the purpose of *putting* being used on said building, which instruction is as follows:

“That plaintiff during the month of May, A. D. 1910, delivered building material at the request of N. D. McCauley, to the building on lot 21, block 2 of the Town of Cordova, Alaska, for the purpose of being used on said building, said materials being furnished on the following dates and used for the following purposes:

“May 20th, A. D. 1910, material costing \$2.40 used

in putting in shelves in the living apartments of said building. [247]

“May 30th, A. D. 1910, material costing \$1.75 used in the construction of said building.”

XV.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #17, for the reason that the evidence shows that the plaintiff in the month of June delivered building material at the request of Norman McCauley to said building on lot 21, block 2 for the purpose of being used on said building, which instruction is as follows:

“That the plaintiff, during the month of June, A. D. 1910, delivered building material at the request of N. D. McCauley to the building on lot 21, block 2 of Cordova, Alaska, for the purpose of being used in said building, said material being furnished on the following dates and used for the following purposes:

“June 2, A. D. 1910, building material, the price of which was \$12.93, used for the construction and extending of shelving in said building.

“June 2, A. D. 1910, material, the price of which was \$2.53, used in the making of additional section for enlarging office in said building.

“June 3, A. D. 1910, building material, the price of which was \$3.05, used in making additional section for enlarging office in said building.

“June 4, A. D. 1910, material, the price of which was 54¢ used for making additional section for enlarging office in said building.

“June 10, A. D. 1910, material, the price of which

was \$2.14 used for construction of a counter in said building.

“June 1, A. D. 1910, material, the price of which was \$5.13, used for the construction of a show or display window.” [248]

XVI.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #18, for the reason that the evidence shows that the plaintiff furnished building material on the 8th day of July, A. D. 1910, at the request of Norman McCauley, it being used on the building on lot 21, block 2 which instruction is as follows:

“That the plaintiff during the month of July, A. D. 1910, delivered building material on July 8th, 1910, at the request of N. McCauley to the building on Lot 21, Block 2 of Cordova, for the purpose of being used in said building, said materials costing 24¢.

XVII.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #19, for the reason that the evidence shows that on the 6th day of August the plaintiff furnished building material at the request of Norman McCauley to be used on the building on lot 21, block 2, which instruction is as follows:

“That the plaintiff on the 6th day of August, A. D. 1910, delivered building material at the request of N. D. McCauley to the building on lot 21, block 2, of Cordova, for the purpose of being used in said building on said lot, said material costing \$3.00.”

XVIII.

The Court erred in refusing to adopt Plaintiff's

Finding of Fact #20, for the reason that the evidence shows that the plaintiff furnished lumber after deducting all credit on the bill for lumber furnished on Lot 21, Block 2, to the amount of \$2,236.57, which amount remains unpaid, which instruction is as follows:

“That the price for all of the material furnished for the construction of the building on lot 21, block 2 of Cordova, by the Arctic Lumber Company, was and is after deducting all credit \$2,236.57, which amount remains unpaid.” [249]

XIX.

That the Court erred in refusing to adopt Plaintiff's Finding of Fact #21, for the reason that the evidence shows that the Arctic Lumber Company filed on the 6th day of September, 1910, in the office of the Recorder of Cordova, Recording Precinct, its claim of lien verified, which claim was recorded in Book 1 of Liens, page 488 in the said Recording Precinct, and that the plaintiff began its action to foreclose said claim of said lien within 6 months from the filing and recording of same; which instruction is as follows:

“That the Arctic Lumber Company on the 6th day of September, A. D. 1910, filed for record in the office of the Recorder of Cordova, Recording Precinct, its claim of lien verified, the precinct in which lot 21, block 2 of Cordova, Alaska, is located, which claim or lien was recorded in book 1 of Liens, page 488, in the said recording precinct, and that plaintiff began its action to foreclose said claim on lien within six months from the filing and recording of same.”

XX.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #22, for the reason that the evidence shows that Norman McCauley represented to the plaintiff as late as August 6, 1910, that *he not* completed the house he was building, on lot 21, block 2 of Cordova, which instruction is as follows:

“That the defendant N. D. McCauley, represented to the Arctic Lumber Company as late as August 6th, A. D. 1910, that he had not completed the house he was building, on lot 21, block 2 of Cordova, Alaska, and represented that said house was not completed as late as August 6th, A. D. 1910.”

XXI.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #23, for the reason that the evidence shows, also exhibits, that the steam-heating plant called for and specified in the contract between Borden and McCauley and Palmer [250] entered into on the 17th day of February, A. D. 1910, for the construction of said building on lot 21, block 2, was not completed as late as August 6, 1910, in that the steam-heating plant had not put in and the building had only been partially painted, which instruction is as follows:

“That the steam-heating plant called for and specified in the contract between W. H. Borden and N. D. McCauley and C. W. Palmer entered into on the 17th day of February, A. D. 1910, for the construction of the building on lot 21, block 2 of Cordova, Alaska, was not put in said building as late as August 6th, A. D. 1910, and said building was only

painted on the front end or the end of the building facing the street.”

XXII.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #24, for the reason that the evidence shows that the defendant, W. H. Borden, on or about the 1st day of October, 1910, declared the lease or contract referred to in the evidence for leasing lot 21, block 2, and the erection of the building thereon, forfeited between McCauley and Palmer because they had failed to keep and perform the covenants contained in said contract or lease, which instruction is as follows:

“That the defendant, W. H. Borden, on or about the first day of October, A. D. 1910, declared the lease or contract entered into between W. H. Borden and N. D. McCauley and C. W. Palmer, on the 17th day of February, A. D. 1910, for the leasing of lot 21, block 2, and the erection of said building, forfeited for failure of defendants, N. D. McCauley and C. W. Palmer, to keep and perform the covenants contained in said contract or lease, and said defendant, W. H. Borden, took possession of said property including the house erected thereon and ever since has held possession of same and collected the rents from same.”

XXIII.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #25, for the reason that the evidence shows that the [251] building on lot 21 of block 2 was not completed on the 6th day of September, 1910, when plaintiff filed its lien, which in-

struction is as follows:

“That the building on lot 21, block 2 of Cordova, Alaska, was not completed on the 6th day of September, A. D. 1910, when plaintiff filed its lien.”

XXIV.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #28, for the reason that the evidence shows that the interest of the defendant, W. H. Borden, is subject to and subsequent to the lien and claim of the plaintiff, which instruction is as follows:

“That the claim or interest of defendant, W. H. Borden, in or to said Lot 21, Block 2, is subject to and subsequent to the lien and claim of the plaintiff.”

XXV.

The Court erred in refusing to adopt Plaintiff's Findings of Fact #30, in that the evidence shows that the defendants, N. D. McCauley and C. W. Palmer, had not surrendered possession of their lease-holding to defendant, W. H. Borden, and said possession was taken and said lease forfeited without the due process of law and without securing the consent of N. D. McCauley and C. W. Palmer, which instruction is as follows:

“That the defendants, N. D. McCauley and C. W. Palmer, did not at any time and has not surrendered to defendant, W. H. Borden, their leasehold or interest in and to Lot 21, block 2, of the town of Cordova, Alaska, and the building erected thereon, and that possession of said property was taken by W. H. Borden or his agent, without securing the consent of

N. D. McCauley and C. W. Palmer.”

XXVI.

That the Court erred in refusing to adopt [252] Plaintiff's Findings of Fact #32, for the reason that the evidence shows that the defendant, W. H. Borden, began the construction of the building on lot 21, block 2 on the 17th day of February 1910, at the time of the beginning of the foundation of said building and said foundation was to be a part of the house to be erected by McCauley and Palmer as contemplated and agreed in their contract introduced in the evidence, which instruction is as follows:

“That the defendant, W. H. Borden, begun the construction of the building on lot 21, block 2, of the town of Cordova, Alaska, on the 17th day of February A. D. 1910, at the time of beginning the foundation of said building.”

XXVII.

That the Court erred in refusing to adopt Plaintiff's Finding of Fact #33, for the reason that the evidence shows that the notice posted by W. H. Borden on the 24th day of February, 1910, was not posted in a conspicuous or accessible place nor upon the land nor upon the building or improvement for which the plaintiff furnished the building material, namely, the superstructure, unless the foundation and building is to be considered as one, which instruction is as follows:

“That the notice posted by W. H. Borden, on the 24th day of February, A. D. 1910, was not posted in a conspicuous place upon the land or upon the building or improvement for which the plaintiff furnished

the building material, namely, the structure or building on lot 21, block 2 of the town of Cordova, Alaska.”

XXVIII.

That the Court erred in refusing to adopt Plaintiff's Finding of Fact #34, for the reason that the evidence shows that the lien of the Arctic Lumber Company was filed thirty days prior to the completion of the building, for which material was furnished on lot 21, block 2 of the town of Cordova, Alaska, which instruction is as follows: [253]

“That the claim of lien of the Arctic Lumber Company was filed within 30 days prior to the completion of the building for which the materials were furnished on lot 21, block 2 of the town of Cordova.”

XXIX.

The Court erred in refusing to adopt Plaintiff's Finding of Fact #35, for the reason that the evidence shows that the defendant, N. D. McCauley, at all times from the beginning of the construction of said building up to and including the 6th day of September, A. D. 1910, represented to the plaintiff, Arctic Lumber Company, that said building was not completed, and represented that all of the material furnished by the plaintiff was to be used and was for the construction of the building on lot 21, block 2, which instruction is as follows:

“That the defendant, N. D. McCauley, at all times from the beginning of the construction of said building and the furnishing of the material by the plaintiff for said building up to and including the 6th day of September, 1910, represented to the plaintiff that

said building was not completed, and purchased building material from the plaintiff up to and including the 6th day of August, A. D. 1910, representing that said building material was to be used and was for the construction of the aforesaid house.”

XXX.

That the Court erred in not adopting the first conclusion so offered and tendered by the plaintiff, which is as follows:

“That it is due and owing the plaintiff, the Arctic Lumber Company, \$2,236.57 for lumber and building materials furnished and delivered to lot 21, block 2, of the town of Cordova, Alaska, at the request of N. D. McCauley for the construction and erection of the house or building constructed on said lot and block.” [254]

XXXI.

That the Court erred in not adopting the second conclusion as offered and tendered by the plaintiff, which is as follows:

“That the plaintiff, Arctic Lumber Company, is entitled to a decree establishing their lien for the sum of \$2,236.57, upon lot 21, block 2 of the town of Cordova, Alaska, and the building erected thereon, and such further amount to include their expenses and costs in this suit.”

XXXII.

Court erred in not entering Judgment for the plaintiff.

XXXIII.

The Court erred in finding as a fact the Third Finding of Fact, for the reason that said finding is

contrary to the facts, and does not contain or set out the full conditions of the lease or contract, which conclusion is as follows:

“That on or about the 17th day of February, 1910, the defendant, W. H. Borden, leased said lot to the defendants, Norman McCauley and C. W. Palmer, for the full term of five years, at an agreed rental of seventy-five dollars per month, ground rent. That under the terms of said lease the said defendants, Norman McCauley and C. W. Palmer, were to erect a building 25 feet by one hundred feet on said lot, two stories in height, and that in case of default in the payment of rent or a violation of any covenant contained in said lease that same should be terminated, and that the defendant, W. H. Borden, should go into possession thereof and become the owner of all buildings and other improvements erected or made on said property by the defendants, Norman McCauley and C. W. Palmer.

XXXIV.

The Court erred in finding as a fact the Fourth Finding of Fact, for the reason that said finding is contrary [255] to the facts, and for the further reason that said contract referred to in said finding only provides for doing or competing of the wood-work of said building, which finding is as follows:

“That thereafter and on or about the 23d day of February, 1910, the defendant, Chas. Goodall, entered into a written contract with the defendants Norman McCauley and C. W. Palmer, by the terms of which the said Goodall was to erect said building on said lot at the agreed price of \$1900.00.”

XXXV.

The Court erred in finding as a fact the Fifth Finding of Fact, for the reason that the evidence shows that the said notice was not posted in a conspicuous or accessible place, and for the further reason that said notice provided that the said W. H. Borden had and claimed an interest in and to the building to be erected on said property, which Finding is as follows:

“That on the 24th day of February, 1910, the defendant, W. H. Borden, posted a notice in a conspicuous place upon said lot notifying all persons that he would not be responsible for the expense of any construction, alterations or repairs incurred in the erection of said building or for any material used therein.”

XXXVI.

The Court erred in finding as a fact the Sixth Finding of Fact, for the reason that the evidence fails to show that said building was completed on the 14th day of April, 1910, as the said Goodall's contract only provided for doing the woodwork of said building, which finding is as follows:

“The Court further finds that said building was completed by the defendant, Goodall, on the 14th day of April, 1910, the ground floor of which was occupied at that time by the defendants Norman McCauley and C. W. Palmer and the second floor of which was occupied as a rooming-house by one Mrs. Mattern.”

XXXVII.

The Court erred in finding as a fact the Ninth

[256] Finding of Fact, for the reason that same is contrary to the evidence, and for the further reason that the evidence shows that said building was not completed according to the original plans, which finding is as follows:

“That after the 14th day of April, 1910, up to and including the 6th day of August of the same year, the plaintiff furnished to the defendants, Norman McCauley and C. W. Palmer, small lots of lumber for the purpose of making alterations, changes and repairs in said building which were no part of the original plans of the same, but which arose after said building was completed on the said 14th day of April, 1910, and that plaintiff has not shown that the small lots of lumber alleged to have been delivered by it to the said defendants, Norman McCauley and C. W. Palmer, on the 8th day of July, 1910, and the 6th day of August of the same year, were ever used in the construction of the said building or in the alteration of repair thereof.”

XXXVIII.

The Court erred in finding as a fact the Tenth Finding of Fact, for the reason that said finding is contrary to the evidence, which instruction is as follows:

“That a period of more than thirty days had elapsed from the date of the completion of said building to the time of the filing of said lien in the Recorder’s Office by the plaintiff.”

XXXIX.

The Court erred in finding as a fact the Eleventh Finding of Fact, for the reason that there is no evi-

dence to support said Finding, and no evidence that the plaintiff was notified of any change of plans nor any evidence that W. H. Borden had consented to any change of plans, which finding is as follows:

“That the said defendants, Norman McCauley and C. W. Palmer, after the execution of said lease, abandoned the [257] plan of installing a heating plant and other features in said building as provided in said lease, and adopted different plans in accordance with the terms and plans set out in the written contract with the defendant Goodall.”

XL.

The Court erred in finding as a fact the Twelfth Finding of Fact, for the reason that the same is contrary to the evidence in the case, which instruction is as follows:

“The Court further finds that all the material allegations alleged in the answer of the defendant, W. H. Borden, are true.”

XLI.

The Court erred in concluding and adopting the following Conclusion of Law, for the reason that the same is contrary to the law and evidence of the case, which conclusion is as follows:

“From the foregoing Facts the Court finds as Conclusions of Law that the plaintiff is not entitled to the lien on the lands and premises described in the complaint or the building erected thereon by the lessees Norman McCauley and C. W. Palmer, for the sum of money mentioned in the complaint of plaintiff or for any other sum whatever, either as against any interest which the said lessees have in said land

or building on account of said lease or against the interest owned by the defendant W. H. Borden either in said land or building. And that said defendant, W. H. Borden, is entitled to a decree dismissing said action and to a judgment against the plaintiff for his costs incurred in same.”

XLII.

The Court erred in overruling the plaintiff's Motion for a New Trial. [258]

XLIII.

The Court erred in entering Judgment against the plaintiff, for the reason that the said Judgment is contrary to law and is not supported by the pleadings or evidence in this action.

WHEREFORE, by reason of the errors assigned, the appellant herein prays that said Judgment be reversed.

R. J. BORYER,

Attorney, Cordova, Alaska.

KERR & McCORD,

Attorneys, Seattle, Washington.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 14, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [259]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT,
CHARLES GOODALL, NORMAN McCAU-
LEY and C. W. PALMER,

Defendants.

**Order Settling and Certifying Bill of Exceptions and
Record and for the Transmission of Certain
Original Exhibits.**

The matter of settling the bill of exceptions and record on appeal on the part of the Arctic Lumber Company, Plaintiff, in the above-entitled action, coming on for hearing on this the 14th day of May, A. D. 1913, and the said Arctic Lumber Company, by its attorney, R. J. Boryer, presenting to the Court, the Honorable Peter D. Overfield, what purports to be all the testimony and evidence upon which said case was tried and final judgment and decree herein was rendered, except Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," "O," "P," "Q," "R," "S," "T," "U," "V," and Exhibits of *Defents* 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, which said exhibits shall be transmitted to the Circuit Court of Appeal with this Bill of Exceptions and record by the Clerk of Court, under his seal and cer-

tificate, also the objections and exceptions to such evidence as allowed: and the Court hereby orders that the said record, transcript of evidence and exceptions be filed in the above-entitled court and the attached and foregoing exceptions and record, and each of them, are by the Court allowed and the same are made a part of the record of this case. [260]

Done in Chambers this the 14th day of May, A. D. 1913.

PETER D. OVERFIELD,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 14, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page 245. [261]

**[Order Directing Transmission of Original Exhibits
to Circuit Court of Appeals.]**

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT,
CHARLES GOODALL, NORMAN McCAULEY and C. W. PALMER,
Defendants.

On oral motion of plaintiff for an order directing the Clerk of this Court to send to the United States

Circuit Court of Appeals for the Ninth Circuit the original exhibits in said cause, being numbered *Plaintiff* "A" to "V," inclusive, and Defendant's Exhibits 1 to 22, inclusive, as a part of the return of said Clerk to the appeal in this case, and it having been stipulated between the attorneys that said original exhibits be transmitted to the Appellate Court:

NOW, THEREFORE, IT IS HEREBY ORDERED that the Clerk of this Court be and he is hereby authorized and directed to send to the United States Circuit Court of Appeals for the Ninth Circuit each and all of the said original exhibits in said cause as a part of the return of this appeal.

Dated this the 14th day of May, A. D. 1913.

PETER D. OVERFIELD,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 14, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal 7, page No. 246. [262]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT,
CHARLES GOODALL, NORMAN Mc-
CAULEY and C. W. PALMER,

Defendants.

Citation on Appeal.

United States of America,—ss.

The President of the United States of America to
W. H. Borden, George Gilbert, Charles Goodall,
Norman McCauley and C. W. Palmer, and Their
Attorneys, Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal of record in the office of the Clerk of the United States District Court in and for the District of Alaska, Third Division, wherein the Arctic Lumber Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, Arctic Lumber Company, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, and the seal of said [263] District Court, this the 14th day of May, 1913, and of the Independence of the United States the one

hundred and thirty-seventh.

PETER D. OVERFIELD,
District Judge, Presiding in the District Court for
the District of Alaska, Third Division.

[Seal] Attest: ANGUS McBRIDE,
Clerk of the District Court for the District of Alaska,
Third Division.

Service of copy received May 14, 1913.

BROWN & LYONS,
Attorneys for Defendant W. H. Borden.
Entered Court Journal No. 7, page No. 247. [264]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT,
CHARLES GOODALL, NORMAN Mc-
CAULEY and C. W. PALMER,
Defendants.

**Order Enlarging Time to File Record and Docket
Cause.**

Upon application of R. J. Boryer and Kerr & McCord, attorneys for Arctic Lumber Company, appellant in the above-entitled cause, good cause appearing therefor,

IT IS ORDERED that the time for filing and docketing the transcript on appeal with the Clerk

of the United States Circuit Court of Appeals for the Ninth Circuit be, and is hereby, enlarged to and including the 14th day of July, A. D. 1913.

PETER D. OVERFIELD,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 14, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 248. [265]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT,
CHARLES GOODALL, NORMAN Mc-
CAULEY and C. W. PALMER,
Defendants.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California, a copy of the record in the above-entitled cause as a return to the Appeal sued out of said Circuit Court of Appeals, to review the judgment of said cause consisting of the following files, records, exhibits and proceedings in said cause, and this praecipe:

1. Complaint.
2. Demurrer of W. H. Borden and Order on Demurrer.
3. Demurrer of Geo. K. Gilbert and Order on Demurrer.
4. Answer of W. H. Borden.
- 4½. Judgment by Default as to McCauley and Palmer.
5. Reply of Arctic Lumber Company.
6. Findings of Fact and Conclusions of Law.
7. Decree.
8. Plaintiff's Proposed Findings of Fact and Conclusions of Law.
9. Plaintiff's Exceptions to Refusal of Court to Make Findings and Conclusions Offered by Plaintiff.
10. Plaintiff's Objections to Defendants Offered Findings and Conclusions. [266]
11. Exceptions of Plaintiff to Findings of Fact and Conclusions of Law Signed.
12. Motion for New Trial.
13. Order Denying Motion for New Trial.
14. Order and Stipulation Extending Time to Prepare and Serve Bill of Exceptions.
15. Order Settling and Allowing Bill of Exceptions.
16. Certificate of Judge to Bill of Exceptions.
17. Petition for Appeal.
18. Order Allowing Appeal.
19. Assignment of Errors.
20. Bond for Costs.
21. Citation and Copy.
22. Acceptance of Service of Papers on Appeal.

23. Minute Orders.

24. Original Exhibits and Order for Same.

25. Order Enlarging Time to File Record and
Docket Cause.

26. This Praecipe.

Dated this the 14th day of May, A. D. 1913.

R. J. BORYER,

Attorney, Cordova, Alaska.

KERR & McCORD,

Attorneys, Seattle, Washington.

[Endorsed]: Filed in the District Court, Territory
of Alaska, Third Division. May 14, 1913. Angus
McBride, Clerk. By Thos. S. Scott, Deputy. [267]

No. C. 11.

*In the District Court for the Territory of Alaska,
Third Division.*

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN, GEORGE GILBERT,
CHARLES GOODALL, NORMAN Mc-
CAULEY and C. W. PALMER,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That the Arctic Lumber Company, as principal, and
John Reidy and E. L. Harwood, as sureties, acknowl-
edge ourselves to be jointly and severally indebted
to W. H. Borden in the above sum of FIVE HUN-

DRED DOLLARS, conditioned that WHEREAS, on the 8th day of June, A. D. 1912, in the District Court of the United States for the District of Alaska, Third Division, in a suit pending in that court, wherein Arctic Lumber Company, plaintiff, and W. H. Borden et al., defendants, said suit being number C. 11, and a Decree was rendered against the said Arctic Lumber Company, and the said Arctic Lumber Company having obtained an appeal to the United States Circuit Court of Appeals and filed a copy thereof in the office of the clerk of the court to reverse the said decree and a citation directed to the said W. H. Borden, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, on the 13th day of June, A. D. 1913.

Now, if the said Arctic Lumber Company shall prosecute its appeal to effect and answer all damages and costs, if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed with our seals and dated this the 26th day of May, A. D. 1913.

ARCTIC LBR. CO.,

Principal.

By R. R. STEWART,

Manager and Secretary.

JOHN REIDY,

Surety.

E. L. HARWOOD,

Surety.

United States of America,
District of Alaska,—ss.

John Reidy, being first duly sworn, deposes and says: I am worth the sum of FIVE HUNDRED DOLLARS, over and above all debts and liabilities, and exclusive of property exempt from execution.

JOHN REIDY.

Subscribed and sworn to before me this 26th day of
May, A. D. 1913.

[Seal] A. JUDSON ADAMS,
Notary Public in and for the District of Alaska, Re-
siding at Cordova, Alaska.

United States of America,
District of Alaska,—ss.

E. L. Harwood, being first duly sworn, deposes and says: I am worth the sum of FIVE THOUSAND DOLLARS over and above all debts and liabilities, and exclusive of property exempt from execution.

E. L. HARWOOD.

Subscribed and sworn to before me this the 26th
day of May, A. D. 1913.

[Seal] A. JUDSON ADAMS,
Notary Public in and for the District of Alaska, Re-
siding at Cordova, Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 31, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [269]

[Plaintiff's Exhibit "A"—Invoice Dated March 7, 1910, of Material Furnished N. McCauley.

N. McCauley.

540½.

March 7th, 1910.

170	3 pc 6x6—14 Rgh Com.	126		
	2 " " 12 " "	72		
	2 " 1x6 10 S1S "	10		
	11 " " 12 " "	66		
	2 " " 14 " "	14		
	9 " " 16 " "	72	360—30.00	10.80
	240 lin Plaster Crds.		.01	2.40
	2 bbls Tar 1062#		.02½	26.85
	10 rolls Tar paper		1.80	18.00 58.05
178	¾M shingles		5.00	3.75
182	1 pc 2x14—16 S4S Clear	37	47.50	1.76
	To Mee- han's shop	1 " 2x16 16 " "	43	50.00 2.15
		2 " 4x4 16 " "	43	42.50 1.83
		1 " 3x6 18 " "	27	30.00 .81
	Milling by Meehan			7.00 13.55
				<hr/> 75.35
			4485	
			375	
			4860	
			7535	
			2675	

[270]

[Plaintiff's Exhibit "B"—Delivery Receipt Dated
March 12, 1910.]

Duplicate.

Order No. 215.

Cordova, Alaska, 3/12, 1910.

Foot of C St.

Phone No. 5.

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley.

16 pc 1x5—14 Pulley stile

3 " " —12 " "

5 " " 16 " "

72 Lin 2x8 window sill

14 pc 1x6—12 S4S clear

14 " 1x6—16 " "

336 Lin 1x2 Blind stop

340 " 1½ O. G. stop

340 " Parting Bead

Tallied by Teamster A. T. Co. Received by H. W. G.

N. McCauley.

March 12th, 1910.

578.

215	440 lin 5" Pulley stile	.04	17.60
	72 " 2x8 Wdw Sill	.07	5.04
	14 pc 1x6—12 S4S Clear 84		
	14 " " 16 " " 112 196	42.50	8.33
	336 lin 2" Blind stop	.02	6.72
	340 " 1½ OG Stop	.01½	5.10
	340 " Parting Bead	.01	3.40 46.19

[271]

[Plaintiff's Exhibit "C"—Invoice Dated March 15, 1910, of Material Furnished N. McCauley.]

N. McCauley.

March 15th, 1910.

598.

239

3 pc 1x4—10 S4S Clear 10	42.50	.43
--------------------------	-------	-----

243 1 Wdw 28x32	1.25
-----------------	------

16 lin 2x8—Sill	.07	1.12	4.80
-----------------	-----	------	------

[272]

[Plaintiff's Exhibit "D"—Delivery Sheet Dated March 31, 1910.]

N. McCauley.

March 31st, 1910.

771.

446 5 doors 2—6x6—6 1 $\frac{3}{8}$	3.00	15.00
-------------------------------------	------	-------

[273]

[Plaintiff's Exhibit "E"—Delivery Receipt, etc., Dated April 24, 1910.]

Duplicate.

Order No. 714.

Cordova, Alaska, 4/24, 1910.

Foot of C St.

Phone No. 5.

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley.

2 pc 6x6—22' Rgh. Com.

1 " " —24' " "

1 " " —12' " "

1 " 4x6—20' " "

2 " " —22' " "

2 " " —24' " "

3 " " —14' " "

12 " 2x6—24' " "

12 " 2x4—24' " "

4 " 1x8— 4' shiplap.
 6 " " — 6' "
 4 " " — 8' "
 6 " " —10' "
 16 " " —12' "
 8 " " —14' "
 14 " " —16' "
 2 " " —22' "
 2 " " —24' "

Tallied by Teamster A. T. Co. Received by C. W.
 Palmer.

N. McCauley.

Apr. 21, 1910.

1000.

714	2	Pc.	6x6—22	Rgh. Com.	132
	1		24		72
	1		12		36
	1	4x6	20		40
	2		22		88
	2		24		96
	3		14		84
	12	2x6	24	SSE	288
	12	2x4	24		192
	4	1x8	4	Ship Lap	11
	6		6		24
	4		8		22
	6		10		40
	16		12		128
	8		14		75
	14		16		150
	2		22		29
	2		24		32
					1539
					30.00
					46.17

**[Plaintiff's Exhibit "F"—Invoice Dated April 21,
1910, of Material Furnished N. McCauley.]**

N. McCauley.

985

Apr. 21, 1910.

694

4 Pc. 2x4—14, SSE Com. 37 30.00 1.11

[275]

**[Plaintiff's Exhibit "G"—Delivery Receipt Dated
April 25, 1910, etc.]**

Duplicate.

Order No. 743.

Cordova, Alaska, 4/25, 1910.

Foot of C St.

Phone No. 5.

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley.

2 pc 2x6—24' S. S. E.

4 " 2x4—24' "

19 " 1x8—16' shiplap.

Tallied by Teamster A. T. Co. Received by C. W.
Palmer.

N. McCauley.

Apr. 25, 1910.

1021

743

2 Pc. 2x6—24 SSE Com. 48

4 2x4 24 64

19 1x8 16 Ship lap 203 315 30.00 / 9.45

[276]

**[Plaintiff's Exhibit "H"—Delivery Receipt Dated
April 25, 1910, etc.]**

Duplicate.

Order No. 753. Cordova, Alaska, 4/25, 1910.

Foot of C St.

Phone No. 5

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley

2 pc. 2 x12—20 s. s. e.

4 pc. 11¼x12—16 Stepping.

Tallied by.....Teamster A. T. Co. Received by
N. McCauley. Apr. 25, 1910.

N. McCauley

1029

752

2 Pc. 2	x12—20 SSE Com.	80	30.00	2.40
---------	-----------------	----	-------	------

4	11¼x12—16 Stpg.	80	60.00	4.80
---	-----------------	----	-------	------

7.20

[277]

**[Plaintiff's Exhibit "I"—Invoice Dated April 26,
1910, of Material Furnished N. McCauley.]**

N. McCauley Apr. 26, 1910.

1035

762

1 Pc. 2	x12—16 SSE Com.	32	30.00	.96
---------	-----------------	----	-------	-----

1	11¼x12— 4 Stpg.	5	60.00	.30
---	-----------------	---	-------	-----

1.26

[278]

[Plaintiff's Exhibit "J"—Invoice Dated April 30, 1910, of Material Furnished N. McCauley.]

N. McCauley		Apr. 30, 1910.	
1082			
814			
5	Pc. 1x4—10	S4S Clear 17	50.00 .85
821	3 10M ³ / ₄	10	.50
			1.35

[279]

[Plaintiff's Exhibit "K"—Delivery Receipt Dated May 20, 1910.]

Duplicate.

Order No. 1113. Cordova, Alaska, 5/20, 1910.
Foot of C St.
Phone No. 5.

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley.

2 pc. 1x 8—16 s 4 s clean.
2 " 1x10—16 " "

Tallied by Teamster A. T. Co. Received by
N. Macauley.

N. McCauley. May 20th, 1910.

1284							
1113	2	pc. 1	8—16	S4S Clear	21		
	2	"	1x10—16	" "	27	48	50.00 2.40

[280]

[Plaintiff's Exhibit "L"—Record of Millwork Dated
May 30, 1910.]

N. McCauley.

May 30, 1910.

1408

1267 Mill work by Meehan March 13 & 28 1.75
[281]

[Plaintiff's Exhibit "M"—Delivery Receipt, etc.,
Dated June 1, 1910, etc.]

Duplicate.

Order No. 1303. Cordova, Alaska, June 1, 1910.
Foot of C St.
Phone No. 5.

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley.

1 pc. 3x3—18 s 4 s.
12 " 2x2—14 "
2 " 1x5—16 "

Tallied by Teamster A. T. Co. Received
by Chas. Goodall.

N. McCauley

June 1, 1910.

1438

1303

1	Pc.	3x3—18	S4S Clear	14			
12	"	2x2—14	"	56			
2	"	1x5—16	"	13	83	50.00	4.15
<hr/>							
14	Lin.	3x4	Stair Rail	.07		.98	
							<hr/>
							5.13

[282]

[Plaintiff's Exhibit "N"—Delivery Receipt Dated
June 2, 1910, etc.]

Duplicate.

Order No. 1310. Cordova, Alaska, June 2, 1910.
Foot of C St.
Phone No. 5.

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley.

10 pc. 1x12—14 s 4 s clear.
2 “ “ —12 “ “
1 “ 1x12—10 “ “
1 “ 1x10—12 “ “
2 “ 1x 8—12 “ “
3 “ 1x 6—12 “ “
4 “ “ —14 “ “
2 “ 2x 4—16 S1S1E

Tallied byTeamster A. T. Co. Received
by Chas. Goodall.

June 2nd, 1910.

N. McCauley.
1445

1310

10 Pc. 1x12—14 S4S Clear 140
2 “ “ 12 “ 24
1 “ 10 “ 10
1 “ 1x10—12 “ 10
2 “ 1x 8—12 “ 16
3 “ 1x 6 12 “ 18
4 “ “ 14 “ 28 246 50.00 12.30
2 “ 2x 4 16 S1S1E Com. 21 30.00 .63 12.93

[Plaintiff's Exhibit "O"—Invoice Dated June 2,
1910, of Material Furnished N. McCauley.]

June 2nd, 1910.

N. McCauley.

1441

1306

1 Pc. 4x4—12	S4S Clear.	16		
2 " 2x2—14	" "	9 25	50.00	1.25
8 Lin. 2"	Bed Mldg.	.02		16
8 " 4"	Crown "		.04	32
80 " 1" 1/4	Round		.01	80
				<hr/>
				2.53

[284]

[Plaintiff's Exhibit "P"—Invoice Dated June 3,
1910, of Material Furnished N. McCauley.]

June 3d, 1910.

N. McCauley.

1453

1313

2 Pc. 1x4—10	S4S Clear.	7	50.00	.35
50 Lin.	Round		.01	.50
28 " 1x2	Blind Stop		.02	.56
1 Pc. 1x5—10	S4S Clear.	5		
1 " 1x8—12	"	8 13	50.00	.65
16 Lin. 4"	Bed Mldg.		.04	.64
1 Pc. 1x6—14	S4S Clear.	7	50.00	.35
				<hr/>
				3.05

[285]

[Plaintiff's Exhibit "Q"—Invoice Dated June 4, 1910, of Material Furnished N. McCauley.]

June 4th, 1910.

N. McCauley.

1466

1331	1 pc. 2x4—1 S1S1E Com.	12	30.00	.36
1336	8 lin. 1½ round		.01	.08
	10 " ¾ "		.01	.10 .54

[286]

[Plaintiff's Exhibit "R"—Invoice Dated June 10, 1910, of Material Furnished N. McCauley.]

June 10th, 1910.

N. McCauley.

1551

1426	1 pc. 1x12—12 S4S Clear.	12	50.00	.60
	50 lin. 1" Panel Mldg.		.01	.50
	16 " 4" Bed Mldg.		.04	.64
	16 " 2½ " "		.02½	.40 2.14

[287]

[Plaintiff's Exhibit "S"—Delivery Receipt, Dated
July 8, 1910, etc.]

Duplicate.

Order No. 1733. Cordova, Alaska, July 8, 1910.

Foot of C St.

Phone No. 5.

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley.

24 Lin. $\frac{1}{4}$ Round.

Tallied by Teamster A. T. Co. Received
by N. Macauley.

July 8th, 1910.

N. McCauley.

1839

1733

24 Lin. Round .01 .24

[288]

[Plaintiff's Exhibit "T"—Delivery Receipt Dated
August 6, 1910, etc.]

Order No. 1958. Cordova, Alaska, Aug. 6, 1910.

Foot of C St.

Phone No. 5.

ARCTIC LUMBER COMPANY.

Delivered to N. McCauley.

6 pc. 1x12—8' S4S Com.

1 " " —10 "

3 " " —14 "

Tallied by Teamster A. T. Co. Received
by N. McCauley.

Aug. 6, 1910.

N. McCauley.

2040

1958—6 pc. 1x12— 8 S1S Com. 48

1 “ “ —10 “ “ 10

3 “ “ —14 “ “ 42

 100 \$30.00 \$3.00

[289]

[Plaintiff's Exhibit "U"—Certified Copy of Contract, Dated February 17, 1910, Between W. H. Borden and N. D. Macauley and C. W. Palmer.]

THIS INDENTURE, Made this 17th day of February, A. D., 1910, by and between W. H. Borden, of Cordova, Alaska, the party of the first part, and N. D. Macauley and C. W. Palmer, the parties of the second part, Witnesseth: That the said party of the first part, for and in consideration of the rents hereinafter specified, to be paid and reserved, and the covenants of the parties of the second part, hereinafter specified to be kept and performed, has Let, Leased and Demised, and by these presents does Let, Lease and Demise unto the said parties of the second part, all of that certain parcel of land situated in the town of Cordova in the Territory of Alaska, and particularly described as lot twenty-one (21) of Block two (2) of the town of Cordova, as the same appears on the map and plat of said town on file in the office of U. S. Commissioner in Cordova, Alaska.

TO HAVE AND TO HOLD, Unto the said parties of the second part, his heirs and assigns for the period of five years from and after the first day of April, 1910.

In consideration of this lease the parties of the second part covenant and agree to pay to the party of the first part, his heirs or assigns a monthly rental of seventy-five dollars (\$75.00) to be paid in advance on the first day of each and every month during the running of this lease, and the parties of the second part covenant to pay the said rent for the full period of five years as hereinbefore stipulated, and it is agreed that if they shall so fail to pay said rent that the whole sum of rent for the entire unexpired term of this lease shall at the option of the party of the first part then and there become due and payable.

The party of the first part agrees to grade said lot and to put in at his own expense a good and suitable foundation for a building two stories and a basement in height to cover the entire lot, to wit: 25 feet by 100 feet in size more or less, the same *to done* at once with due diligence. [290]

The parties of the second part agree to at once commence and to fully finish a building on said lot, at their expense to be twenty-five feet by one hundred feet in size and two stories and a basement in height, and to wire the same for electric light and telephone and to equip the same with steam heat and radiators, said steam heat to be either furnished by a boiler in the building or from and through steam pipes from outside the building, and to fully

complete and install suitable plumbing for water, with toilet and wash basins complete, it being expressly understood that the said heating *plat* and appliances, including radiators and wiring and plumbing and *tiolets* and wash basins shall be considered as part of the building, and are not to be removed therefrom. It is also agreed that parties of the second part pay for the electric light and water.

The parties of the second part covenant and agree to pay for all material and labor in the construction of said building and that they will protect the said property from any lien on account of said building, and their failure so to do shall, at the option of the party of the first part, terminate this lease.

It is further agreed that any arrangement made with the owners of lot 22 in said block 2, adjoining this leased lot, concerning right of way or the use of stairs or the like shall inure to the benefit of the party of the first part, at the termination of this lease or the forfeiture thereof under the provisions thereof.

The parties of the second part agree to insure the building to be constructed on said lot against loss by fire in a sum not less than twenty-five hundred dollars and in case of the destruction or damage of said building by fire the sum of money collected on account of said insurance shall be used in rebuilding or repairing the same if the parties of the second part shall so desire, or if they fail so to rebuild or repair said building the sum of money so collected on account of said insurance shall be paid to and for the use of the party of [291] the first part.

It is expressly agreed and understood and made a condition precedent to this lease that the parties of the second part shall not assign or transfer the same without first obtaining the consent of the party of the first part.

This is hereby declared to be the essence of this indenture, and the failure of the parties of the second part to pay any installment of rent when due as herein provided shall at the option of the party of the first part render this lease null and void, and the party of the first part may thereupon enter said premises and remove all persons therefrom.

The parties of the second part covenant that they will not remove any building or permanent improvement from the said lot during the life of this lease.

The failure of the parties of the second part to perform any of the covenants herein contained shall in like manner render at the option of the party of the first part, this lease null and void.

The parties of the second part agree to pay at taxes that may be levied or assessed against said property during the running of this lease.

The parties of the second part covenant and agree that at the expiration of this lease or its termination as herein provided for, they will quietly and peaceably surrender the possession of the premises to the party of the first his heirs or assigns, together with the building thereon and all improvements including steam heating appliances, plumbing, and toilets, wash basins, etc., and wiring.

The party of the first covenants to and with the parties of the second part, paying the rents as here-

in provided, and observing the covenants herein contained shall and may quietly and peaceably have and hold the said premises for the full term herein expressed. [292]

In witness whereof the said parties have hereunto set their hands and seals this 17 day of February, 1910.

Done in prescnce.

W. H. BORDEN.

N. D. MACAULEY.

C. W. PALMER.

United States of America,
Territory of Alaska,—ss.

On this 17th day of February, 1910, before me, the undersigned notary public, personally came W. H. Borden, N. D. Macauley and C. W. Palmer, to me known to be the identical persons named in and who executed the foregoing indenture, and acknowledged to me that they signed and sealed the same as and for their voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal this 17th day of February, 1910.

[Seal]

JOHN GOODELL,

Notary Public for Alaska.

Filed for record this 1st day of March, 1910, at 3 o'clock, P. M.

O. A. TUCKER,

U. S. Commissioner and ex-officio Recorder.

United States of America,
District of Alaska,—ss.

THIS IS TO CERTIFY, that the foregoing four sheets contain a full, true and complete copy of that certain instrument in writing therein set forth, and that the same is of record in the office of the undersigned, Commissioner of the Precinct of Cordova, District of Alaska, on page 191 of Miscellaneous.

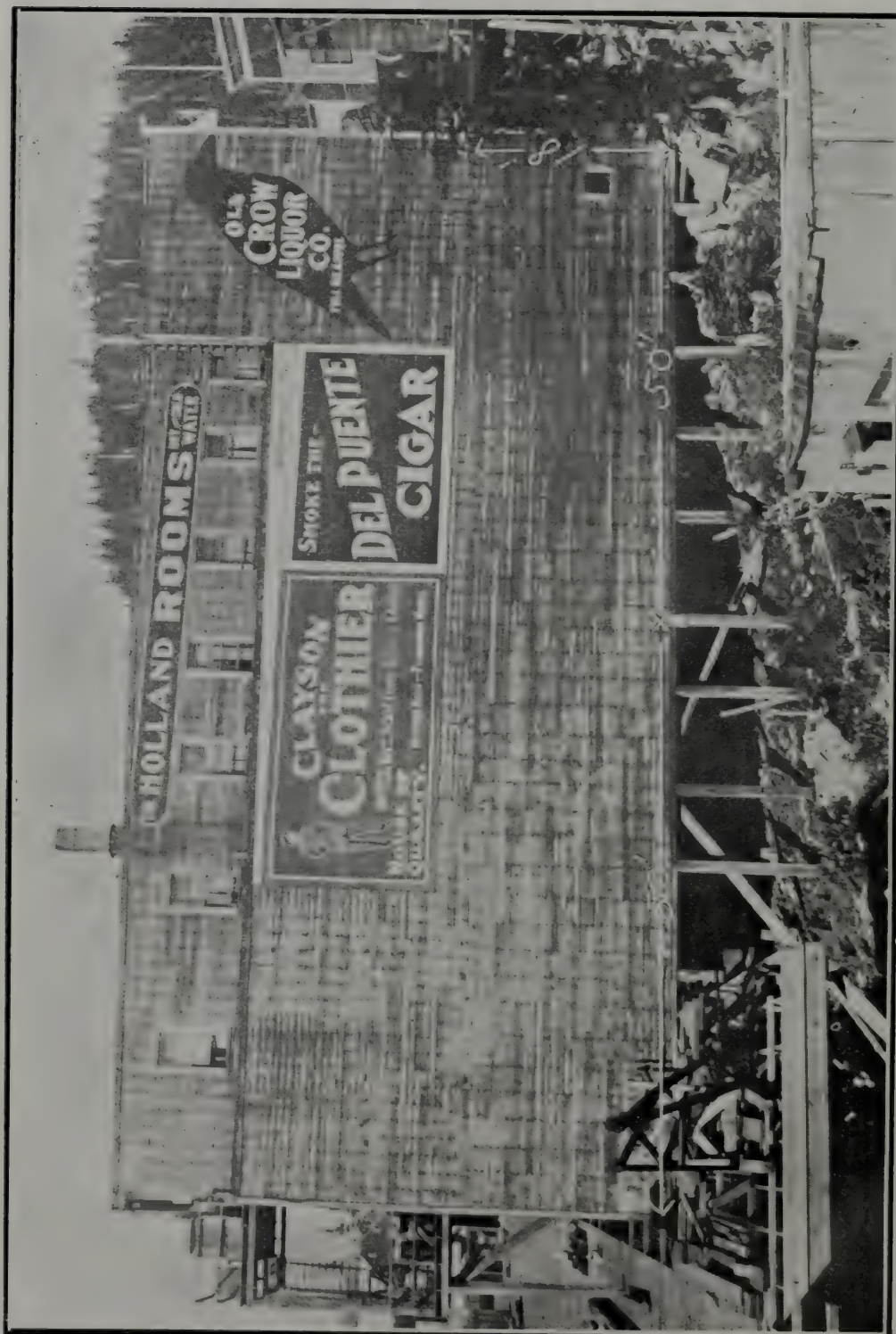
In witness whereof I have hereunto set my hand and official seal this 9th day of November, A. D. 1911.

[Seal]

O. A. TUCKER,

Commissioner and ex officio Recorder. [293]

[Plaintiff's Exhibit "V"—Photograph.]



[Defendant's Exhibit No. 1—Letter Dated March 1, 1910, W. H. Borden to Arctic Lumber Co.]

Cordova, Alaska, March 1st, 1910.

Arctic Lumber Company,

Cordova, Alaska,

Dear Sir;

Enclosed find draft on Bank of Wayne, Goldsboro, N. C., for \$312.92 in full of your bill for lumber sold to me for the foundation structure on Lot 21 of Block 2 of the town of Cordova.

Under my lease with Messrs. Macauley and Palmer, I agreed to erect the foundation on said lot and they agreed to erect the building thereon at their own expense and turn the same over to me at the end of five years to be then my property and free from debt or mechanics' liens as part consideration for said lease. They agreed to protect me from any mechanic's lien and this protection has been secured by my posting a mechanic's lien notice on the property according to law.

Respectfully yours,

W. H. BORDEN. [295]

[Defendant's Exhibit No. 2—Contract Between Macaulay and Palmer and Charles Goodall.]

This agreement between Macaulay and Palmer, parties of the first part, and Charles Goodall, party of the second part witnesseth, Goodall party of the second part agrees to do all carpenter work on a

building for parties of the first part on lot 21, in block 2, in Cordova, Alaska. According to the plans and following specifications, the building is to be 25 feet by 100 feet more or less in size with two stories and basement in height. Street floor to be fitted with wenscoting about $5\frac{1}{2}$ feet high, south wall above street level will be supported by a girder consisting of 2x16 planks spiked together and supported by enough posts to carry the weight. Party of the second part also agrees to make two bay windows in front on the second floor, and build stairway from street floor to basement. All studding and ceilings are to be left bare ready for lath and plaster. All studdings are to be placed 16 feet on centre except in basement where they will be placed 20 feet on centre. Building paper and one thickness of ship lap is to be placed on the outside of studding, roof is to be covered with tar felt paper on shiplap and paper is to be well tarred. The parties of the first part agree to furnish all material necessary to do all carpenter work above mentioned. The party of the second part agrees to do all said carpenter work in a substantial and workmanlike manner, to fit doors and windows properly and make all plate glass frames and partitions *off* office and toilet on street floor in a neat manner. In consideration for all the above mentioned work, the parties of the first part agree to pay the party of the second part the sum of \$1900.00/100 to be paid in the following terms:

One third when frame is up and one third when roof is on and outside covering is in place and one

third when carpenter work is finished.

MACAULEY & PALMER,

Per N. MACAULEY.

CHAS. GOODALL.

Witness:

_____.

_____ [296]

[Defendant's Exhibit No. 3—Bill Dated April 21,
1910, Arctic Lumber Co. to N. McCauley.]

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street

Phone No. 5. 22

Cordova, Alaska, April 21st, 1910.

Sold to N. McCauley.

Order No. 1000.

2	Pc. 6x6—22	Rgh. Com.	132
1	“	24	72
1		12	36
1	“ 4x6—20		40
2		22	88
2		24	96
3		14	84
12	Pc. 2x6—24	S1S1E	288
12	“ 2x4—24		192
4	“ 1x8— 4	Shiplap.	11
6		6	24

4	8	22			
6	10	40			
16	12	128			
8	14	75			
14	16	150			
2	22	29			
2	24	32	1539	30.00	46.17

[297]

[Defendant's Exhibit No. 4—Bill Dated April 30,
1910, Arctic Lumber Co. to N. McCauley.]

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, April 30th, 1910.

Sold to N. McCauley,

Order No. 1082.

5 Pc. 1x4—10	S4S Clear.	17			
3	10	“	10	27	50.00 1.35

[298]

**[Defendant's Exhibit No. 5—Bill Dated April 21,
1910, Arctic Lumber Co. to N. McCauley.]**

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, April 21st, 1910.

Sold to N. McCauley,

Order No. 985.

4 Pc. 2x4—14 S1S1E	37	30.00	1.11
--------------------	----	-------	------

[299]

**[Defendant's Exhibit No. 6, Bill Dated April 25,
1910, Arctic Lumber Co. to N. McCauley.]**

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, April 25th, 1910.

Sold to N. McCauley,

Order No. 1029.

2 Pc. 2 x12—20 S1S1E	80	30.00	2.40
----------------------	----	-------	------

4 " 11¼x12—16 Stepping	80	60.00	4.80 7.20
------------------------	----	-------	-----------

[300]

**[Defendant's Exhibit No. 7—Bill Dated April 25,
1910, Arctic Lumber Co. to N. McCauley.]**

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.
T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, April 25th, 1910.

Sold to N. McCauley,

Order No. 1021.

2 Pc. 2x6—24	S1S1E	48	
4 “ 2x4—24	“	64	
19 “ 1x8—16	Shiplap	203	315 30.00 9.45

[301]

**[Defendant's Exhibit No. 8—Bill Dated April 26,
1910, Arctic Lumber Co. to N. McCauley.]**

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.
T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, April 26th, 1910.

Sold to N. McCauley,

Order No. 1035.

1 Pc. 2	x12—16	S1S1E	32	30.00	.96
1 “	1¾x12—	4 Stepping	5	60.00	.30 1.26

[302]

**[Defendant's Exhibit No. 9—Bill Dated May 20,
1910, Arctic Lumber Co. to N. McCauley.]**

Home Office: Seattle, Wash.

Michael Earles, Pres.

R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres.

J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, May 20th, 1910.

Sold to N. McCauley,

Order No. 1284.

2 Pc. 1x 8—16 S4S Clear. 21

2 “ 1x10—16 “ 27 48 50.00 2.40

[303]

**[Defendant's Exhibit No. 10—Bill Dated May 30,
1910, Arctic Lumber Co. to N. McCauley.]**

Home Office: Seattle, Wash.

Michael Earles, Pres.

R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres.

J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, May 30th, 1910.

Sold to N. McCauley,

Order No. 1408.

Mill Work by Meehan March 13 & 28 1.75

[In pencil:] Labor or shelving work done by
Meehan. **[304]**

[Defendant's Exhibit No. 11—Bill Dated June 1,
1910, Arctic Lumber Co. to N. McCauley.]

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, June 1st, 1910.

Sold to N. McCauley,

Order No. 1438.

1 Pc. 3x3—18	S4S Clear.	14		
12 “ 2x2—14	“	56		
2 “ 1x5—16	“	13	83	50.00 4.15
14 Lin. 3x4	Stair Rail		.07	98 5.13

[305]

[Defendant's Exhibit No. 12—Bill Dated June 2,
1910, Arctic Lumber Co. to N. McCauley.]

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, June 2nd, 1910.

Sold to N. McCauley.

Order No. 1441.

1 Pc. 4x4—12 S4S Clear	16				
2 “ 2x2—14 “	9	25	50.00	1.25	
<hr/>					
8 Lin. 2” Bed Mldg			.02	.16	
8 “ 4” Crown			.04	.32	
80 “ Qt Round			.01	.80	2.53
<hr/>					

[306]

[Defendant's Exhibit No. 13—Bill Dated June 2, 1910, Arctic Lumber Co. to N. McCauley.]

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Sold to N. McCauley.

Order No. 1445.

Cordova, Alaska, June 2nd, 1910.

10 Pc. 1x12—14 S4S Clear	140				
2 12 “	24				
1 10 “	10				
1 Pc. 1x10—12 “	10				
2 “ 1x 8—12 “	16				
3 “ 1x 6—12 “	18				
4 “ 14 “	28	246	50.00	12.30	
<hr/>					
2 Pc. 2x 4—16 S1S1E	21	30.00	.63	12.93	
<hr/>					

[307]

**[Defendant's Exhibit No. 14—Bill Dated June 10,
1910, Arctic Lumber Co. to N. McCauley.]**

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, June 10th, 1910.

Sold to N. McCauley.

Order No. 1551.

1 Pc 1x12—12 S4S Clear	12	50.00	.60	
50 Lin 1" Panel Mldg		.01	.50	
16 " 4" Bed Mldg		.04	.64	
16 " 2½ " "		.02½	.40	2.14
				<hr/>

[308]

**[Defendant's Exhibit No. 15—Bill Dated June 3,
1910, Arctic Lumber Co. to N. McCauley.]**

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, June 3rd, 1910.

Sold to N. McCauley.

Order No. 1453.

2 Pc 1x4—10 S4S Clear	7	50.00	.35	
50 Lin Qt Round		.01	.50	

28	“	1x2 Blind stop		.02	.56	
1	Pc	1x5—10 S4S Clear	5			
1	“	1x8—12 “	8 13	50.00	.65	
<hr/>						
16	Lin	4" Bed Mldg		.04	.64	
1	Pc	1x6—14 S4S Clear	7	50.00	.35	3.05
<hr/>						

[309]

[Defendant's Exhibit No. 16—Bill Dated June 4, 1910, Arctic Lumber Co. to N. McCauley.]

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, June 4th, 1910.

Sold to N. McCauley.

Order No. 1466.

1	Pc	2x4—18 S1S1E	12	30.00	.36	
8	Lin	Qt Round		.01	.08	
10	“	“			.10	.54

[310]

[Defendant's Exhibit No. 17—Bill Dated July 8, 1910, Arctic Lumber Co. to N. McCauley.]

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, July 8th, 1910.

Sold to N. McCauley.

Order No. 1839.

24 Lin Qt Round .01 .24

[311]

[Defendant's Exhibit No. 18—Bill Dated August 6, 1910, Arctic Lumber Co. to N. McCauley.]

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres. J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, Aug. 6th, 1910.

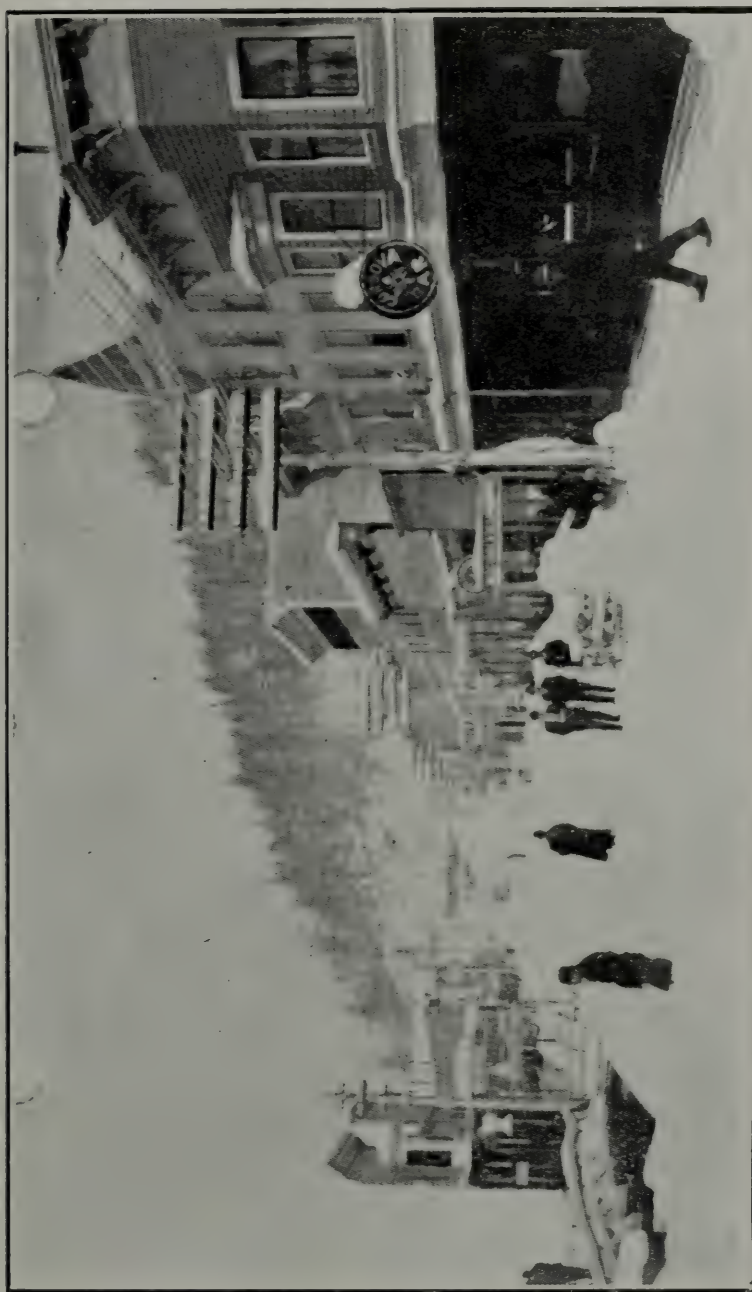
Sold to N. McCauley.

Order No. 2040.

6 Pc 1x12—	8 S1S Com	48			
1 “	10 “	10			
3 “	14 “	42	100	30.00	3.00

[312]

[Defendant's Exhibit No. 19—Photograph.]



12220. Winter Scene, 1st Ave., Cordova, Alaska. Terminal C. R. & N. W. Ry.
Published by O. Kennedy, Cordova, Alaska. Copyright, 1910, by O. Kennedy.

[313]

**[Defendant's Exhibit No. 20—Ground Lease Dated
February 17, 1910, Between W. H. Borden and
N. D. Macaulay and C. W. Palmer.]**

GROUND LEASE.

This indenture, made this 17th day of February, A. D. 1910, by and between W. H. Borden, of Cordova, Alaska, the party of the first part, and N. D. Macaulay and C. W. Palmer the parties of the second part, WITNESSETH: That the said party of the first part, for and in consideration of the rents hereinafter specified, to be paid and reserved, and the covenants of the parties of the second part, hereinafter specified to be kept and performed, has LET, LEASED and DEMISED, and by these presents does LET, LEASE and DEMISE unto the said parties of the second part, all of that certain parcel of land situated in the town of Cordova in the Territory of Alaska, and particularly described as lot twenty one (21) of Block two (2) of the town of Cordova as the same appears on the map and plat of said town on file in the office of the U. S. Commissioner in Cordova, Alaska.

To have and to hold unto the said parties of the second part his heirs and assigns for the period of five years from and after the first day of April, 1910.

In consideration of this lease the parties of the second part covenant and agree to pay to the party of the first part, his heirs or assigns a monthly rental of seventy five dollars (\$75.00) to be paid in advance on the first day of each and every month during the running of this lease, and the parties of the second

part covenant to pay the said rent for the full period of five years as herein before stipulated, and it is agreed that if they shall so fail to pay said rent that the whole sum of rent for the entire unexpired term of this lease shall at the option of the party of the first part then and there become due and payable.

The party of the first part agrees to grade said lot and to put in at his own expense a good and suitable foundation for a building two stories and a basement in height to cover the entire lot, to wit: 25 ft. by 100 feet in size more or less, the same to be done at once with due diligence.

The parties of the second part agree to at once commence and to fully finish a building on said lot, at their own expense to be [314] twenty five feet

1 JOHN GOODELL.

by one hundred feet in size and two stories and a basement in height, and to wire the same for electric light and telephone, and to equip the same with steam heat and radiators, said steam heat to be either furnished by a boiler in the building or from and through steam pipes from outside the building, and to fully complete and install suitable plumbing for water, with toilet and wash basins complete it being expressly understood that the said heating plant and appliances including radiators and all wiring and plumbing and toilets and wash basins shall be considered as part of the building, and are not to be removed therefrom. It is also agreed that parties of the second part pay for electric light and water.

The parties of the second part covenant and agree

to pay for all material and labor in the construction of said building, and that they will protect the said property from any lien on account of said building, and their failure so to do shall, at the option of the party of the first part terminate this lease.

It is further agreed that any arrangements made with the owners of the lot 22 in said block 2, adjoining this leased lot, concerning right of way or the use of stairs or the like shall inure to the benefit of the party of the first part at the termination of this lease or the forfeiture thereof under the provisions thereof.

The parties of the second part agree to insure the building to be constructed on said lot against loss by fire in a sum not less than twenty five hundred dollars, and in case of the destruction or damage of said building by fire the sum of money collected on account of said building shall be used in rebuilding or repairing the same if the parties of the second part shall so desire, or if they fail so to rebuild or repair said building the sum of money so collected on account of said insurance shall be paid to and for the use of the party of the first part.

It is expressly agreed and understood and made a condition precedent to this lease that the parties of the second part shall not assign or transfer the same without first obtaining the consent of the party of the first part in writing.

2 JOHN GOODELL. [315]

This is hereby declared to be of the essence of this indenture, and the failure of the parties of the second part to pay any installment of rent when due

as herein provided shall at the option of the party of the first part render this lease null and void, and the party of the first part may thereupon enter said premises and remove all persons therefrom.

The parties of the second part covenant and agree that they will not remove any building or permanent improvement from the said lot during the life of this lease.

The failure of the parties of the second part to perform any of the covenants herein contained shall in like manner render at the option of the party of the first part, this lease null and void.

The parties of the second part agree to pay all taxes that may be levied or assessed against said property during the running of this lease.

The parties of the second part covenant and agree that at the expiration of this lease or its termination as herein provided for, they will quietly and peaceably surrender the possession of the premises to the party of the first part his heirs or assigns, together with the building thereon and all improvements including steam heating appliances plumbing, and toilets, wash basins etc., and wiring.

The party of the first part covenants to and with the parties of the second part that the said parties of the second part, paying the rents herein provided, and observing the covenants herein contained shall and may quietly and peaceably have and hold the said premises for the full term herein expressed.

In witness whereof the said parties have hereunto

set their hands and seals this 17 day of February, 1910.

W. H. BORDEN.
N. D. MACAULAY,
C. W. PALMER.

Done in presence:

JOHN GOODELL,
D. J. PRENDERGAST.

3 JOHN GOODELL. [316]

United States of America,
Territory of Alaska,—ss.

On this 17th day of February, 1910, before me, the undersigned Notary Public, personally came W. H. Borden, N. D. Macaulay and C. W. Palmer, to me known to be the identical persons named in and who executed the foregoing indenture, and acknowledged to me that *the* signed and sealed the same as and for their voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal this 17th day of February, 1910.

[Seal]

JOHN GOODELL,
Notary Public for Alaska.

4 JOHN GOODELL.

[Endorsed]: The within instrument was filed for record at 3 o'clock, P. M. Mar. 1, 1910, and duly recorded in book 1 Misc. on page 187 of the records of said District. O. H. Tucker, District Recorder.
[317]

Ground Lease. W. H. Borden to MacCaulay & Palmer. Feb. 17, 1910.

The within instrument was filed for record at 3 o'clock, P. M., Mar. 1, 1910, and duly recorded in book 1 Misc. on page 187 of the records of said District. O. H. Tucker, District Recorder.

Indexed and compared. [318]

[Defendant's Exhibit No. 21—Notice Re Mechanics' Liens.]

Copy.

NOTICE REGARDING MECHANICS' LIENS.

I, W. H. Borden, the owner of the lot on which this foundation structure stands, being lot No. 21 in Block No. 2 of the town of Cordova, Alaska, and the owner of this foundation structure thereon and an owner of an interest in the building and improvements to be placed thereon, to-wit: the entire ownership of said building and improvements from and after the termination of a certain lease dated February 17th, 1910, and running not longer than April 1st, 1915, subject to all the terms of said lease, HEREBY GIVE NOTICE that I will not be responsible for any construction, alteration or repair had or done on said lot or structures, or for any material or work or labor thereon or therefor.

Dated February 24th, 1910.

W. H. BORDEN,

Owner of said Property and Interest. [319]

Defendant's Exhibit No. 22—Letter Dated March 1, 1910, W. H. Borden to Arctic Lumber Co. and Registry Receipt No. 3928 and Letter Dated March 5, 1910, Arctic Lumber Co. to W. H. Borden.]

U. S. Registered Mails go to every post office in the world.

Letters and parcels may be registered at any post office or at any post-office station, and by rural carriers throughout their routes. Letters will be registered by letter carriers in the residential districts of cities.

For registered mail delivered through a U. S. post office, the sender receives without request or extra charge, a return receipt signed by the addressee or his agent. For registered mail delivered in a foreign country the sender receives without extra charge a form of return receipt if the words "Return Receipt Demanded" appear on the envelope or wrapper.

Letter }
Parcel } No. 3928.

P. O., Cordova, Alaska.

Received for registration 3/1/10,
190 , from W. H. Borden, addressed to Arctic Lumber Co., Cordova, Alaska. Postmaster, per P.
1 class postage prepaid.

Cordova, Alaska, March 1st, 1910.

Arctic Lumber Company,

Cordova, Alaska,

Dear Sir:

Enclosed find draft on Bank of Wayne, Goldsboro, N. C., for \$312.92 in full of your bill for lumber sold to me for the foundation structure on Lot 21 of Block 2 of the town of Cordova.

Under my lease with Messrs. Macauley and Palmer, I agreed to erect the foundation on said lot and they agreed to erect the building thereon at their own expense and turn the same over to me at the end of five years to be then my property and free from debt or mechanics liens as part consideration for said lease. They agreed to protect me from any mechanic's lien and this protection has been secured

by my posting a mechanic's lien notice on the property according to law.

Respectfully yours,

W. H. BORDEN.

* * * * *

Cordova, Alaska, March 1st, 1910.

This is to certify that the undersigned witnessed W. H. Borden enclose the original of the above carbon copy of letter to Arctic Lumber Company with draft for \$312.92 in envelope and register it to Arctic Lumber Company this day and in my presence in the Cordova Post Office, Alaska, and I put my name on the registry receipt for said letter to identify it.

CHAS L. GRABER.

Home Office: Seattle, Wash.

Michael Earles, Pres. R. R. Stewart, Sec'y.

T. L. Harrington, V-Pres.

J. A. Brownrigg, Treas.

ARCTIC LUMBER COMPANY.

Foot of C Street.

Phone No. 5.

Cordova, Alaska, March 5th, 1910.

W. H. Borden, Esq.,

Cordova, *Aaa*.

Dear Sir:

We enclose herewith the receipted bills for material and thank you for same.

We acknowledge receipt of your draft for \$312.92 rial covered by this payment.

Yours truly,

ARCTIC LUMBER CO.

By R. R. STEWART. [320]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C. 11.

ARCTIC LUMBER COMPANY, a Corporation,
Plaintiff,

vs.

W. H. BORDEN,

Defendant.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Angus McBride, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto attached pages, numbered from 1 to 321, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipe filed in my office, May 14th, 1913, and made a part of said transcript, and I hereby certify that the foregoing transcript has been prepared, examined and certified to by me, and the cost thereof, amounting to One Hundred Fourteen and 65/100 (\$114.65) Dollars, has been paid to me by the Plaintiff in Error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 6th day of June, A. D. 1913.

[Seal]

ANGUS McBRIDE,
Clerk. [321]

[Endorsed]: No. 2282. United States Circuit Court of Appeals for the Ninth Circuit. Arctic Lumber Company, a Corporation, Appellant, vs. W. H. Borden, George Gilbert, Charles Goodall, Norman McCauley and C. W. Palmer, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed June 23, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States
Circuit Court of Appeals
 FOR THE NINTH CIRCUIT

ARCTIC LUMBER COMPANY, a
 Corporation,

Appellant,

VS.

W. H. BORDEN, GEORGE GIL-
 BERT, CHARLES GOODALL,
 NORMAN McCAULEY and C. W.
 PALMER,

Appellees.

No. 2282

APPEAL FROM THE U. S. DISTRICT COURT
 FOR THE TERRITORY OF ALASKA,
 THIRD DIVISION

HON. EDWARD CUSHMAN, JUDGE

BRIEF OF APPELLANT

STATEMENT.

This action was instituted by appellant in the District Court of Alaska, Third Division, to foreclose a mechanics lien for lumber furnished and

used in the construction of a store building located on Lot 21, Block 2 Town of Cordova.

The lot upon which the building was erected was owned by appellee, Borden. The building was erected by McCauley and Palmer in pursuance of the terms of a certain lease or contract set out at pages 298-302, Transcript of Record.

On February 17th, 1910, Borden leased to McCauley and Palmer said lot for a period of five years from April 1st, 1910, at a monthly rental of \$75.00, payable monthly in advance.

Appellee Borden agreed at his own expense to forthwith grade the lot and put in a good and suitable foundation for a building two stories and a basement in heighth.

McCauley and Palmer agreed at their expense, as soon as this foundation was in, to erect upon said foundation a building two stories; to wire the same for electric light and telephone and equip the same with steam heat and radiators; to fully complete and install suitable plumbing for water, with toilet and wash basins complete, it being expressly understood that said heating plant, etc., shall be considered as a part of the building and are not to be removed therefrom. The building to revert to Borden. Borden completed the foundation February 23rd, 1910.

On the 23rd of February, 1910, McCauley entered into a contract with appellant for lumber and building material for the building provided for in said lease, in a sum aggregating \$3,480.36, and afterwards paid on account \$1,243.79, leaving a balance unpaid of \$2,236.57. Appellant commenced to furnish the material on February 23rd, 1910, and completed its deliveries August 6th, 1910, and thereafter and prior to the date of the completion of said building, filed in the office of the Recorder of Cordova Recording Precinct, its mechanics lien for said balance of \$2,236.57 and the same was recorded in said office on September 6th, 1910. (See Notice of Lien, Transcript of Record, p. 5-7.)

On February 28th, 1911, appellant commenced its action to foreclose its lien. Demurrers were interposed to the complaint and overruled. Appellee Borden filed his answer admitting the filing of the lien, but denying that it was filed within thirty days of the *completion* of the building, and alleged affirmatively that the building was completed in April, 1910; he denied that appellant had furnished any material for the building after its completion or that any material so furnished after April was used in the construction thereof. He further alleged that on February 24th, (one day after appellant entered into its contract with McCauley and com-

menced to furnish material for said building) "he caused to be posted in a conspicuous place upon the foundation of the building thereafter to be erected upon said lots, a notice that he would not be responsible for any construction, alteration or repair had or done on said lot or structure or for any material or labor thereon or therefor."

He also alleged that about October 1st, 1910, McCauley and Palmer had forfeited their lease by failure to keep the covenants thereof and that he had dispossessed them and he therefor denied they had a leasehold interest against which a lien could be enforced.

These affirmative matters were put in issue by appellant's reply. McCauley and Palmer were defaulted. The cause proceeded to trial May 27th, 1912. At the conclusion of its hearing on May 27th, the trial court found for defendant Borden and entered its decree dismissing appellant's action, from which decree of dismissal and judgment this appeal is prosecuted.

ASSIGNMENTS OF ERROR.

I.

The Court erred in refusing to make and return as its findings of fact and conclusions of law each and every of the findings of fact and conclusions of law proposed by appellant, and found on pages 226 to 239, inclusive, of the Transcript.

II.

The Court erred in making and entering the findings of fact and conclusions of law proposed by appellees and found on pages 218 to 221, inclusive, of the transcript.

III.

The Court erred in decreeing that the lien of the appellant was not a valid lien on the lands and premises described in its complaint.

IV.

The Court erred in finding and decreeing that the plaintiff's lien was invalid and inoperative against the leasehold interest of McCauley and Palmer.

V.

The court erred in holding and decreeing that the plaintiff's action be dismissed and in rendering the judgment against the plaintiff for costs.

VI.

The Court erred in finding, holding and ruling that the notice, Exhibit 1, Transcript page 305, was posted by appellee at a conspicuous place upon the real estate covered by the lien.

VII.

The Court erred in holding and ruling that the building on the property covered by the lien had been completed more than thirty days prior to the filing of appellant's lien, and in holding that the building had been completed at all.

VIII.

The Court erred in ruling and holding that the posting of any notice by the appellee upon the premises had any effect whatever upon the rights of appellant to maintain a lien upon the premises.

IX.

The Court erred in refusing to enter a decree in favor of appellant establishing its lien in accordance with the prayer of its complaint.

To the refusal of the Court to make the findings of fact and conclusions of law and the decree as requested by the appellant, due and timely exceptions were taken, as well as to the finding of fact and conclusions of law made and entered by the Court, and as well to each of the rulings upon each error as predicated as above set forth, which exceptions were by the Court in each instance duly allowed.

ARGUMENT.

That appellant furnished and delivered to McCauley and Palmer lumber and building material for use in the construction of a building on Lot 21, Block 2, of the Town of Cordova, of which appellee was the owner, of the reasonable value of \$3,480.36, and that substantially all thereof entered into the construction of said building; that there was paid on account thereof but \$1,243.57, leaving a balance of \$2,236.57 unpaid, is not a matter of serious, if any, dispute.

Appellee Borden undertook to show that there were six or seven boards and a small piece of quarter round that was not used. (See Evidence Courtright, p. 165. Goodall, pp. 108-109, 148-9). But this is so unimportant that it is immaterial.

The fact is that from February 23rd to August 6th appellant supplied for this building in excess of the payment made on account, material of the value of \$2234.57 for which it has not been paid. On October 1st, 1910, less than two months after appellant ceased to furnish this material, appellee Borden had dispossessed McCauley and Palmer, taken possession of the building, and appropriated it to his own use.

Under appellee's contract with McCauley and Palmer, they were to erect this building and on payment of a monthly rental of \$75.00 were to remain in possession of the premises for five years. The rent was payable in advance, commencing April 1st, 1910, so that up to October 1st when they were dispossessed, seven installments of rent had matured. Of this amount McCauley and Palmer had paid rent up to and including August, 1910, (see Goodell, p. 150) so that when appellee took possession October 1st, the rent for September was in default. Appellee has since rented the property for as high as \$150.00 per month. (See Goodell, p. 134.) It appears from the evidence that in the latter part of August, 1910, Palmer left Cordova for Seattle and McCauley followed him two weeks later or about the 1st of September, and that neither returned to Cordova.

Now, if the decree of the trial court stands, the appellee becomes the beneficiary to the extent of the

value of appellant's material, \$2234.57, and at the same time is enabled to collect double the rental provided for by his lease.

The trial court took the view that the lien could not be enforced against Borden, for the reason that he had protected himself and his property by posting a notice in a conspicuous place on the building within three days after he had knowledge of the construction of the building, "that he would not be responsible" for labor and material entering into its construction. The court, also, notwithstanding the provisions of the contract, held that inasmuch as the building was occupied in April, 1910, it was completed when occupied, even though the contract required the wiring of the building for light and the installation therein of a heating plant, and that accordingly the lien not having been filed until September 6th, 1910, was filed too late and was ineffective, either against the fee of the lot or the leasehold interest of McCauley and Palmer. The Court further found that all material furnished after occupancy about April 14th, 1910, was used in effecting alterations and repairs of the building, and that accordingly the lien was filed more than thirty days after the last of the material was furnished and was of no effect as against either the fee or leasehold estate.

The first question to be determined by this court is "Was the building completed September 6th, 1910, when appellant filed its lien?" If the Court was correct in finding that the building was completed April 14th, 1910, the other questions argued in this brief need not be considered for the lien notice was then filed too late. If on the other hand the building was not completed when the lien was filed, then it becomes material to determine whether the notice posted by Borden was posted "in some conspicuous place upon the land, building or other improvement situated thereon" so as to release the fee and leave the lien to attach only to the leasehold estate.

We invite the Court's attention to the contract between Borden and McCauley and Palmer. (Transcript, p. 76.)

Borden leases Lot 21, Block 2, Cordova to McCauley and Palmer for five years from April 1st, 1910 at a monthly rental of \$75.00 payable in advance and agreed to "grade said lot and to put in at his own expense a good and suitable foundation for a building, two stories and a basement in height to cover the entire lot, to-wit: 25 feet by 100 feet, the same to be done at once with due diligence."

Lessees agree "to at once commence and fully finish a building on said lot, at their expense to be

25 feet by 100 feet in size and two stories and basement in height and *to wire the same for electric light and telephone and to equip the same with steam heat and radiators*, said steam heat to be either furnished by a boiler in the building or from and through steam pipes outside the building and to fully complete and install suitable plumbing, etc., *it being understood that the steam heating plant and appliances, etc., wiring and plumbing, etc., shall be considered as a part of the building.*”

This lease or contract was filed for record by Borden March 1st, 1910 and under that date he called appellant’s attention to it by letter.

Borden purchased lumber from appellant for the foundation for the building and completed it on February 23rd or 24th.

On February 23rd, McCauley called upon appellant’s manager at Cordova and informed him that “he was going to build” a two story house with a basement, to be a rooming house upstairs, to be plastered and lighted and wired for electric lights and telephone, *to contain a steam heating plant, with radiators, etc.* (Transcript, 25). He told him how he was going to furnish it, *put cedar siding over the shiplap*. Mr. Stewart testified that the siding had not been put on, the basement had not been finished nor the heating plant installed when he caused

the lien to be filed (Trans., p. 26). Mr. Stewart testified that just prior to the time McCauley came to Seattle in early September he talked with him about the finishing of the building, and that McCauley told him he was going out to settle an estate in which he was interested, that it was simply a question of his appearance in Seattle and signing the papers, and he would return and complete the building and pay the bills. (Trans., pp. 54-55.) That was before the lien was filed. Stewart further testified (Trans. 56), that when McCauley bought the lumber he said he intended to complete the basement for a skating rink and contracted for lumber for that purpose and that this work had not been done when the lien was filed.

Mr. Feldman, a witness for appellant, installed the plumbing in the building and gave McCauley figures on the heating plant and was told it would be put in and that he would have the job (Trans. 87); that in July, 1910, Borden had written him from Seattle about the heating plant; that Borden told him that the heating plant was going in with the plumbing. (Trans. 89).

Now, under the laws of Alaska, appellant had 30 days after the *completion of the building* within which to perfect its lien. Up to a day early in September when McCauley left for Seattle to settle an

estate, he represented to appellant that the building had not been completed; that he would return in a few days and complete it and thus led appellant to believe that it had an abundance of time under the law within which to file a lien if it deemed such a course necessary for its protection. This evidence stands undisputed in the record. To say in the light of it, that a lien will not lie against the leasehold interest of McCauley and Palmer at least is to permit the owner to lull the material man into inaction by misrepresentations and then reward him for his perfidy.

Now, the lease provided not only for a heating plant which it was "understood was to be a part of the building, not to be removed therefrom," but McCauley and Palmer agreed "to at once commence and *fully finish*" the building, of which this heating plant was to be an essential unremovable part.

We are at a loss to understand how the building can be held by any court to be completed until this essential, integral, unremovable part, to be placed there with expedition, has been finished. The trial court attached great importance to the fact that the building was occupied in April, and allows the mere fact of occupancy to override the express provisions of the contract. There is no

pretense of claim that appellant was notified of any modification of the contract,—indeed there was none.

The trial court seemed to have relied upon certain cases in which a contractor was engaged in erecting for the owner a building, and his delivery of possession to the owner.

In the State of California, the Statute does not permit the filing of a lien until the building has been completed. The question of when a building is completed has been before the courts of that state many times.

“It is provided in Section 1187 that ‘in case of contracts’ the occupation or use of the building, shall be deemed conclusive evidence of completion. This exception to the general rule is by its terms of limited application, and can be invoked in behalf of the claimant only ‘in case of contracts;’ and the ‘contract’ which is here referred to is the one between the owner and him who is termed the ‘original contractor’ under which, and subject to whose terms, the laborer and material man must enforce their liens. One object of this provision is apparent,—that the owner and the contractor shall not by secret agreement between themselves, abandon the original contract before its completion, or dispense with the completion of the building according to its original plan, and thereby, by being able to show that the building has never been in fact completed, prevent the laborer and material man from enforcing their liens.”

Willamette Steam Mills Co. v. Los Angeles Co., 29 Pac. 629, 632;

Lumber Co. v. Sheldon, 32 Pac. 235.

Now, it may be that McCauley, the lessee who put up the building, permitted persons to move into it in April, 1910, but that did not satisfy the provisions of his contract with Borden that he would wire it and install a heat plant, nor could it bind appellant when McCauley was himself representing to it that his building was not in fact completed.

“The original contract, even if void, is admissible to determine the character of building to be erected, and thereby to furnish the test by which it can be known when the building was completed for the purpose of filing liens.”

Bloom Law, Mec. Liens, Par. 792.

Barker v. Doherty, 31 Pac. 1117.

Post v. Sullivan, 43 Pac. 896.

That appellant's lien was filed in time we think cannot be questioned and in holding otherwise the lower court erred.

II.

It is claimed by Borden that his lot was not subject to lien for the reason that he caused a notice to be posted at a conspicuous place thereon within

three days of the time when appellant began to furnish material that he would not be responsible for any construction on said lot for any material therefor. The trial court found that such notice had been posted within the time specified and in the manner provided by the statute and that therefor the right of lien did not exist.

The appellant contends that in this finding the trial court fell into error for two reasons: 1st, that the notice was not in fact posted at such conspicuous place on the premises as the law required; and 2nd, that even if the alleged notice had been so posted it was not effective for the reason that in the light of the provisions of the contract or lease itself, and of the evidence to which we will call the court's attention, the lessees were the mere agents of Borden for the construction of the building.

The surface of the lot upon which the building was erected was below the grade of the street upon which appellant's material could be delivered and was delivered, from eighteen to twenty feet (Trans. 62, 81, 182). (See Exhibit 19, p. 317 Trans.; Exhibit V, p. 304 Trans.).

The building erected covered the entire lot, so that the material therefor could only be delivered in front of the building upon the street. (Trans. 86-203).

In the street immediately in front of the lot was a deep depression, extending to the middle of the street (Trans. 117-118).

To get down to the bottom of the excavation for the building, it was necessary to go down a stairway in the Grand Theatre building on an adjoining lot (Trans. 118, 186), then turn to the left and go through an opening, then down another stairway three or four steps leading down to the snow and rocks and proceed across the face of the lot upon the street to the adjoining property (Ev. Borden, Trans. 186). Another means was "to go down a ladder, or go down the bank and slide down twenty or thirty feet" (Trans., p. 93).

Mr. Stewart, a witness for appellant testified: "The only way to get at it (place where respondent claims to have posted the notice) was to get a ladder and climb down from the sidewalk, or travel around the block to the rear of the building and come along the ground under the building." (Trans., p. 82).

At the bottom of this excavation, upon an upright square timber, fifty feet from the street and eighteen feet below the street level, the appellee posted a typewritten notice *which could not be read from the street*, (Trans, 63-206) and which was not observed, either by appellant or by the contractor who put in the plumbing, Mr. Gilbert, or by Mr.

Gray, appellant's foreman, or by Mr. Lathrop who delivered the lumber (Trans. 62, 115, 93, 90, 129, 169, 175, 176, 206).

Borden, himself, testified that this notice could not be read from the street, the place where the lumber was delivered (Trans. 206). This notice at the time appellant began to deliver the lumber was eleven feet from the ground (Trans. 82).

Now this notice was not in a conspicuous place on the building or premises, unless the law is that the material man is bound to search the premises upon which the building is being erected and for which he is furnishing material, for the purpose of ascertaining whether, perchance, some notice may not be posted at some obscure place thereon. It seems to us that the statute must contemplate that a notice to be effective must be so posted upon the premises that the material man, in furnishing material and delivering it for use in the building, will be afforded an opportunity of observing the notice without making a detailed search of the preimses.

Appellant's manager, Mr. Stewart, or any of appellant's employes delivering the lumber, in order to have discovered and read the notice, would have been required either to have gone down the stairway into the basement of the theatre on the adjoining lot and then down another stairway to the level

of the foundation and then along the front of the building over rocks and debris to the adjoining lot and then fifty feet along the excavation and foundation, to have been able to read a typewritten notice at that time posted eleven feet above the ground, or to have procured a ladder and descended from the level of the street in front of the building, or "slid down twenty or thirty feet" over the rocks to the level of the foundation and then proceeded to the place where the notice was posted.

Appellee testified that he was at Cordova and about the property every day from February 24th when appellant commenced to furnish material, to March 1st, during which time appellant had delivered on the street in front of the lot over one thousand dollar's worth of lumber; he testified that the notice could not be read from the street and place where the lumber was delivered and that while appellant's office was but a few hundred feet away, he did not call the attention of appellant, or any of its servants to the fact that he had posted notice until March first. Borden, therefore, well knew that this notice was not in a place where appellant's employes could or would see it or be able to read it. In the light of these facts we do not think it could be successfully contended that the place where it was posted was such conspicuous place upon the premises as the statute contemplated.

In *Nottingham v. McKendrick*, 63 Pac. 822, the notice was “put on a partition wall several feet back from the street”,—“put in a little recess,” where the material man did not see it. The trial court found that this was not a conspicuous place, and the appellate court sustained the finding. Certainly if a notice “put on a partition wall a few feet from the street” was not posted in a conspicuous place, a typewritten notice put 18 feet below and 50 feet from the street where material was to be delivered and where it could not be read, was not in a conspicuous place.

The contract or lease, Exhibit 20, Trans. 318, between Borden and McCauley provides as the principal consideration therefor, that McCauley shall construct upon Lot 21 and *fully finish* a building twenty-five by one hundred feet, two stories and basement in height, wire it for electricity, equip it with a steam heating plant, including boilers, radiators, etc., install suitable plumbing, toilets, etc., all of which “shall be considered as a part of the building not to be removed,” and that at the *expiration or earlier termination* of the lease, all these improvements *shall revert to* and become the property of Borden.

Now it does not appear from the evidence just what this building was to cost, or did in fact cost.

It does appear that appellant furnished for the building lumber of the value of \$3480.36; that the carpenter who put up the structure was paid \$1900; that the plumber received in part payment for his services \$200. It accordingly does appear that \$5580.36 worth of labor and material actually went into this building, and this does not include the hardware, the steam heating plant, the wiring of the building, nor the full amount of the plumbing bill; nor does it include the plastering. Hence, we think it is entirely safe to say that the cost of the structure completed as contemplated by the contract would closely approximate \$7500. The rent fixed by the terms of the contract or lease at \$75.00 per month or \$900 per year, amounting to \$4500 for the term, was accordingly a minor consideration, the real consideration being the construction and completion of the building, which was to revert to respondent.

Now what happened? Mr. McCauley commenced the construction of the building February 24, 1910, and about the middle of April had the building to a stage of construction where it was possible for a saloon to occupy the lower floor and a lodging house the upper floor, and in the latter part of August had reached the point where it was necessary to install the heating plant therein. The appellant had furnished various items of material

up to August 6th, which had been used in and about the building. By the terms of the lease the rental commenced on April 1st and McCauley had paid appellee four month's rent prior to September 1st. In the latter part of August McCauley and Palmer left Cordova and never returned to complete the building. Appellee promptly took possession of the property and collected rentals from the tenants, as heretofore stated in this brief. McCauley and Palmer had made a payment on account to appellant of about \$1200, leaving a balance due of \$2236.57. They had also paid the plumber \$200. They had made some payments to the contractor who erected the building. It appears that both the plumber and contractor liened the building.

Now if Borden is permitted to declare a forfeiture of the contract before the building is actually completed, and appropriate the building to his own use, good conscience and equity require that he should pay for the material in the building, as well as the cost of erecting it at least. If a court of equity should require him to do that, he would simply pay appellant \$2236 for \$3480 worth of lumber, which he took over to himself in less than sixty day from the date when the last of the material was delivered to and placed into the building.

Is it possible that under these facts Borden can take over, for nothing, a building that cost over \$5500 for three items of material, lumber, erection of the building and part of the plumber's bill, at a time before the building was actually completed, the parties with whom he dealt having absconded, and thus enable him under the strict terms of the forfeiture of his lease to terminate the same, seize the property and have these improvements remain thereon and the title revert to him? A court of equity ought not to permit such an unconscionable thing to be done. Now we contend earnestly that in the light of the facts, the erection and completion of this building under the terms of the contract between Borden and McCauley, afforded the main consideration for the transaction; that the lessees in the construction of this building, particularly in the light of the fact that they abandoned the work before the building had actually been completed, were the mere agents of Borden in contracting for material for its construction.

We invite the court's attention to the case of *Hall v. Parker*, 94 Pa. St. 109. In that case the owner of real estate leased it to Wyers, et al., for a period of five years, the lessee covenanting to make extensive repairs on the building and demised premises during the first year of the tenancy. The rental for the premises was fixed at five dol-

lars for the first year, five hundred dollars for the second year, and six hundred dollars for the remaining years of the term. The lessees let a contract for these repairs. The lessor and owner of the premises gave notice to the contractor before he commenced to supply material or began to work upon the premises that he would not be bound for any of the cost of repairs. The contractor completed the work and liened the property. In a suit to foreclose the lien the owner contended that under the terms of the lease the tenants had covenanted to make the repairs at their own cost; that their leasehold interest alone could be liened, and that having been notified before commencing to furnish material or perform the work, the owner would not be liable for the cost thereof, the contractor must look to the tenant and the lien must fail. The lessees defaulted and the owner dispossessed them. The court upheld the lien against the fee in the land, upon the theory that the cost of making the repairs was in effect under the terms of the lease to be paid by the owner by way of reduction in rent and that the lessees in causing the work to be done were acting as the agents of the owner.

That principle ought to control here. The real consideration for the lease to McCauley was the erection of the building. Borden was careful to

provide in his contract not only that the building and its equipment should revert, but that McCauley should at all times keep the building covered by insurance, the proceeds of which, in the event of fire, was either to be paid to respondent, or used in the repair of the building.

The lien law of Alaska was enacted for the protection of laborers and material men and this court has on numerous occasions stated that "The evident spirit and purpose of the act is to do *substantial justice* to all parties who may be affected by its provisions." Can it be substantial justice for appellee to be permitted to seize the building put up under the terms of the contract in question before its actual completion, as required by the contract, and appropriate structure to his own use, in which was invested in labor and material alone a sum in excess of \$5500?

Analyzed, the contract with McCauley required, before it could become permanently effective, that the lessees should at once commence "and fully finish the building on said lot," etc. and "wire the same for electric light," etc., and "to equip the same with steam heat" etc. It further provides, "The failure of the party of the second part to perform any of the covenants herein contained shall in like manner render, at the option of the first

party, this lease null and void.” In other words, the full completion and equipment of this building was necessary as a condition precedent to its becoming effective. Borden terminated the lease in pursuance of the provisions last above quoted. (Trans., p. 194.)

Now when appellee elected to terminate this contract, McCauley having failed to complete and fully equip the building, and took over the building, he took it subject to every claim for material or labor which up to that date had entered into its construction. He appropriated whatever payments McCauley may have made and penalized him to the extent of those payments.

In *Moore v. Jackson*, 48 Cal. 111, the court say:

“The findings show that the defendant Moulton entered into possession of the premises with the consent of the defendant Jackson and the repairs upon the house were authorized by Jackson. The fact that Jackson expected and Moore agreed that the repairs should be fully paid for by the latter and that he would purchase the property, did not change the relation of these persons as to third parties. Jackson received the benefit of the repairs which he authorized Moore to have made and as to material men and labor, the latter was agent of the former and the estate of the former should be bound by the lien independent of the peculiar language of the statute.”

In the instant case Borden, by his contract with McCauley not only authorized, but required the erection of the building. The work must commence at once and the building must be fully equipped as in the contract provided, and if McCauley failed the contract could be terminated.

In *Otis v. Dodd*, 90 N. Y. 336, it is held that the simple consent of the owner of real estate to the erection of buildings thereon is sufficient to give a material man a lien, and that "where the owner of certain land leased the same for a term of years, the lessee covenanting to erect certain buildings thereon which, at the expiration of the lease, should become the property of the owner, and where the plaintiff, under a contract with the lessee, erected the buildings specified in the lease and filed a notice to effect a lien, he thereby acquired a valid lien against the owner for the balance due him."

See also *Henry v. Miller*, 145 Ill. App. 628.

Kremer v. Walton, 11 Wash. 120.

By terminating the contract and appropriating to himself the uncompleted building, appellee has effectually rendered nugatory the effect of posting a notice, as though he had himself caused the improvement to be made and on his own account.

The provisions with reference to notice in the lien law, it seems to us, were designed to protect the owner in the event a structure was commenced to be erected on his land without his knowledge, when he could protect himself by posting notice within three days after discovery of that fact. Under the contract appellee *required the building to be constructed* and when constructed to become an unremovable part of his real estate. It was to be his building, subject to the right of McCauley and Palmer to use so long only as they complied strictly with the terms of the contract, and providing they fully completed and equipped it. If they defaulted, they could not remove the building, whether completed or incompletd. The material men could not remove it.

In *Miller v. Amusement Company*, 108 Pac. 891, the facts are not fully stated, but it appears that a lessee erected a building and a lien on the fee was upheld. Quoting from the syllabus:

“Where an owner uses a lessee as his agent to construct a building and he had knowledge of the intention to build as early as there was such intention and the lease was given for the purpose of the lessee erecting the building, a finding that the owner did not post notice under California Code Civil Procedure, 1192, within three days after he obtained knowledge of the intended construction was immaterial, for the owner was not entitled to give such notice.”

The court say:

“It is true that it was both alleged and stipulated that Gager was the owner of the premises and that the Amusement Company was the lessee; but neither the ownership of the former, nor the holding of the lease by the latter, prevented the latter from acting as agent of the former in constructing the building.”

In *O’Leary v. Rowe*, 45 Mo. App. 567, a conditional sale of certain lots was made upon the express agreement of the vendee to make certain improvements thereon and the court say:

“The only fair and reasonable construction to be placed on this provision in the contract is that the purchaser was authorized and empowered by the vendor to enter into the contract with the builders to furnish material and erect the buildings on the lots to which he had the legal title. It was within the express contemplation of the parties to the contract that the purchaser should proceed to erect the houses upon the lots of the vendor. By implication from the contract the vendor authorized the purchaser to employ builders, furnish material and erect the buildings, and he has subjected his title to lien therefor.”

Lumber Company v. Churchill, 90 S. W. 405,
and cases.

We insist therefore that when the owner by the terms of his lease required the lessee to build and equip the structure, the building to revert to the owner in the event of default, cannot defeat the

right of material men to a lien by posting a notice, and especially so when he forfeits the lease and takes over the demised premises, before the building is actually completed and for that reason.

Appellant respectfully submits that the judgment of the lower court should be reversed, and a decree directed for appellant.

R. G. BORYER,

Cordova, Alaska,

KERR & McCORD,

Seattle, Washington,

Attorneys for Appellants.

TABLE OF CONTENTS.

	Page
Sec. 1. Introductory	1
Sec. 2. The Claim of Lien Was Filed Too Late. Rule on Appeal.....	2
Sec. 3. Same. The Building was Completed in April	4
Sec. 4. Plaintiff States Itself Out of Court..	21
Sec. 5. There Can be no Foreclosure Against the Fee	25
Sec. 6. Same. The Time to Post the Notice Was When the Lessees Began Their Construction	26
Sec. 7. Same. The Notice Was Posted in a Conspicuous Place	30
Sec. 8. Same. Compliance With the Statute Protected Borden's Property.....	40
Sec. 9. The Claim of Lien Was Void.....	46
Sec. 10. Plaintiff's Plea for Equity.....	47
Sec. 11. Conclusion	49

No. 2282

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARCTIC LUMBER COMPANY (a corporation),	}
<i>Appellant,</i>	

VS.

W. H. BORDEN, GEORGE GILBERT, CHARLES	}
GOODALL, NORMAN McCAULEY and C. W.	
PALMER,	
<i>Appellees.</i>	

BRIEF OF W. H. BORDEN, APPELLEE.

1. Introductory.

The "statement" contained at the beginning of appellant's brief is substantially correct. It purports to set out, however, only the general features of the case as disclosed by the evidence. The facts upon which the decision of the lower court was based are not detailed. In the course of this argument particular mention of them will be made and their importance in a due consideration of the

propriety of the judgment of the lower court will be emphasized.

The issues made by the pleadings and proof are:

(1) Did the plaintiff file its claim of lien in time?

(2) Did the owner, Borden, seasonably post a notice of nonliability in some conspicuous place upon the property so that no lien can be asserted against the fee?

As plaintiff properly states in its brief, a decision against it upon the first proposition will require an affirmance of the judgment below, regardless of other questions raised.

2. The Claim of Lien Was Filed too Late. Rule on Appeal.

Inasmuch as the record presents a conflict of testimony as to the facts underlying the decision of the lower court upon this issue, it is well to point to the rule which appellate courts have laid down as to the propriety of an examination of conflicting evidence where its insufficiency to justify a finding of fact is challenged upon an appeal.

In

Furrer v. Ferris, 145 U. S. 132, 134,

the Supreme Court, speaking by Mr. Justice Brewer, held, in regard to the decision of the lower court upon a question of fact in an equity suit:

“While such determination is not conclusive, it is very persuasive in this court.”

Then quoting from a previous decision of the same court as to the effect of findings:

“Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.”

Barton Bros. v. Texas Produce Co., 136 Fed. 355.

This was a case in the Circuit Court of Appeals for the Eighth Circuit. Upon the same question the court held:

“This was a simple question of fact for the determination of the trial court on the evidence. The function of the District Judge on such a hearing is akin to that of a chancellor in an equity proceeding. Where, as in this case, the hearing was on oral testimony, his conclusions on disputed questions of fact should not be disturbed by the appellate court, except for cogent reasons, such as a palpable mistake or misconception of the decided weight of the evidence. (Citing cases.) The learned judge who heard this case patiently for two days, with opportunity to observe the witnesses, their conduct on the stand, with probable personal knowledge of what manner of men they were, was in better position to form a correct estimate of the probative force to be attached to their testimony than this court can form from the more or less imperfect expression of the testimony in type.”

The situation in the case at bar is identical.

The same principle was laid down in

Shields v. Mongollon Exploration Co., 137 Fed. 539,

where this court, in an opinion by Judge Gilbert upon the effect of a finding on an issue in equity, tried before an Alaska District Court and based upon conflicting testimony, held at page 548:

“Nearly all of the testimony was taken in open court, and the judge who heard the case had the opportunity to observe the demeanor of the witnesses, and to judge concerning their credibility. There was testimony to the effect that Conrad Siem had, prior to the commencement of the suit, expressly admitted the mistake. Findings of fact so made on conflicting evidence cannot be reviewed by this court unless a serious and important mistake appears to have been made in the consideration of the evidence, or an obvious error has intervened in the application of the law. This rule is so firmly established by the decisions of this and other courts as to require no citation of authorities.”

The force of these decisions will become more apparent when in the course of this argument the nature of the testimony and the findings based thereon are more fully considered.

3. Same. The Building Was Completed in April.

After a consideration of the evidence, which presented a square conflict upon the issue, the judge of the District Court decided that the building was completed in the month of April, 1910. Aside from his opportunity to observe the demeanor of the witnesses who appeared before him, and thus to draw his conclusions upon the credibility

of their statements, the judge who tried this case had the advantage of an acquaintance with the premises involved. It affirmatively appears from the record that Judge Cushman had presided in the District Court when it took over the possession of this building in the bankruptcy proceedings brought by the creditors of the lessees (see Trans. pp. 155-6). Another fact which this Court may consider is that the trial was had on the opposite side of the same street and in the same block as that in which the building was located.

But the evidence goes further than to present a mere conflict. It is such that no other conclusion than that the structure was completed in April could reasonably be drawn. The contract made by the lessees with Charles Goodall provided, substantially, for the construction of a complete building (Trans. pp. 305-7). Goodall testified that it was fully performed on the 13th day of April, 1910 (Trans. p. 100). The plastering was finished on the following day (Trans. p. 102). The saloon in the building had opened for business on the 5th or 6th of April (Trans. p. 101), and on the 14th the tenant was moving into the upper portion of the building where a rooming house was thereafter conducted (Trans. p. 102). At this time the building had a priming coat of paint on the front (*id.*). When the work had been begun fifteen laborers had been employed upon the job. These were greatly reduced in number until the completion, when Goodall discharged the last two (Trans. p. 101).

Goodall's testimony shows conclusively that whatever materials were furnished by plaintiff subsequent to this date were used for the purpose of making additions and improvements upon what was at that time a complete structure. Speaking of lumber furnished April 22, 1910, used for a platform in the rear of the building:

Q. It was no part of the original contract?

A. No, sir.

Q. Who employed you to put in that platform?

A. McCauley.

Q. What was the platform used for?

A. Well, they wanted the platform at the back end so people in the saloon could go out of the door and could sit on the platform and look out on the bay. It was a nice place to sit.

Q. Was that in the original plans of the building?

A. No.

Q. That was just an addition to the building after the building was finished?

A. Yes, sir.

(Trans. p. 103.)

Referring to lumber billed three days later the witness stated that it was used for stairs in the rear. He was asked:

Q. Was that any part of the original plans of the building?

A. No.

Q. That was a matter that was thought of after the original building was finished?

A. Yes, sir.

In regard to the next charge made by plaintiff, the witness testified that the lumber was used for

shelving and counters; that these were no part of the original building.

A. Well, the things were thought of afterwards; for instance, the show window, they had that sealed up, in the back of the show window. Of course it kind of cut out the light in the bar-room and McCauley concluded to change that and take that all down, and he made a change in the show window, and there was shelving on that side of the room. He had a kind of wholesale department, selling bottled goods, and he didn't have shelf room enough, so I added some more to it.

(Trans. pp. 104-5.)

The next item was dated May 20, 1910. In regard to this it was testified:

A. Well, as far as I can remember that is lumber that was used for shelves upstairs, for the lady that lived upstairs, Mrs. Mattern. I put some shelves up there in the living room and kitchen.

(Trans. p. 105.)

A. Well, she had a corner shelf to put in there and she had a shelf put up there where they put a curtain around it, as a kind of wardrobe to hang clothes on, with hooks in it.

Q. Who paid you for that?

A. I don't know who paid me for that particular job. She paid me once or twice—when I did work there she paid me sometimes and sometimes she didn't.

Q. Was it paid for, any of these items after the 14th of April, by this \$1900. or as an independent job?

A. No, that is an independent job entirely—that was paid extra.

(Trans. p. 106.)

In regard to bills dated the 1st, 2nd and 3rd days of June, to the questions whether the lumber described therein was used in the construction of the building, witness replied:

A. No; some of this lumber was used in changing the show window and the office; the office used to be right in front, and then when he made the change in the show window, we moved it to the rear of the building, and added two sections to it—made it larger.

Q. Were you paid extra for that work?

A. Yes, sir.

Q. (By the COURT.) Was that an alteration?

A. Yes, sir; that is an alteration.

Q. (By the COURT.) An alteration made after the finishing of the building?

A. Yes, sir.

(Trans. p. 107.)

Further testimony to the same effect in regard to these items appears at pages 145 and 146 of the transcript.

Goodall stated that the lumber charged in the bill rendered by plaintiff June 10, 1910, was used to build a counter in the saloon. For this he was paid extra (Trans. p. 106).

It, therefore, appears (and without contradiction) that the last of these small items of lumber which were used for the purpose of alteration or the installation of trade fixtures was delivered on the 10th day of June, 1910. The shelves so installed were later removed by the trustee in bankruptcy in the proceedings taken against the tenant (Trans. p. 133).

Plaintiff proved a further delivery on July 8th of finishing material for which a charge of 24 cents was made, and on August 6th lumber of the price of \$3. The testimony as to this material was as follows:

Q. Did you ever see that 24 feet of quarter-round—24 cents worth of quarter-round?

A. I don't know anything about that particular piece. I saw quarter-round there that was not used.

Q. Where did you see that?

A. In the basement.

Q. In the basement of what building?

A. This building you are talking about.

Q. When did you see that?

A. I don't know just the date.

Q. About when?

A. During the summer some time, after I was working there.

(Trans. pp. 107-08.)

* * * * *

Q. I will ask you if you know anything about \$3.00 worth of lumber, 1x12, different lengths, delivered there by the Arctic Lumber Company on or about August 6th, 1910. Did you ever see that lumber?

A. I couldn't tell when it was delivered, but I saw lumber there. It has been lying in the basement. It did lie there for quite awhile.

(Trans. p. 108.)

Upon cross-examination Goodall testified:

Q. Your plans and specifications called for a building in the rough—putting up a building in the rough?

A. Finished as it is now.

Q. Were you to do the plastering?

A. Well, no; I was not to do the plastering, but they hired me to look after it and let the contract for it—look after the plastering and superintend it.

(Trans. pp. 138-39.)

* * * * *

Q. I mean in the plans and specifications—was that shown on your plans and specifications?

A. Yes, it showed the plumbing, the wash-basins and everything showed. There were changes made after we got the partitions all set and everything. We probably made some changes in some of the washstands, moved them to more convenient places in the rooms, but it was shown in the plans all right.

* * * * *

Q. Your plans and specifications showed where the wash basins, etc., were to be placed?

A. Yes.

Q. And where the radiators were to be set?

A. No, no radiators.

Q. It didn't provide for the radiators?

A. No, *there was no radiators. It didn't provide for any steam heating plant.*

Q. Your plans and specifications did not?

A. No; for the reason that I didn't think it was the intention to install any steam heating plant at that time. That was to be a consideration to come in later on. They didn't intend to put in any heating plant right then.

* * * * *

Q. What do you mean by later on?

A. Well, whenever money, finances, would allow it, I think.

Q. What did Borden have to say about that—was that suitable to him, that point?

A. I can't recall that I ever discussed the subject with Borden about the steam heating plant, only he said that Macauley had agreed

he would put in a steam heating plant at some future time, otherwise I don't think we discussed it, that I can recall.

(Trans. pp. 140, 141.)

In regard to the lumber and mill work furnished and done in the construction of an office, the witness testified on cross-examination:

Q. Enlarged the office for what purpose?

A. The office was movable, made in sections. It was right up in the front, back of the show window as originally built, and when he made the alteration in the show window, he had to remove that office back to the rear of the barroom and he concluded he wanted it enlarged at the same time with a couple of sections and Meehan made the sash for it.

(Trans. p. 144.)

Speaking of the ultimate intention to cover with cedar siding the shiplap which formed the exterior of the building, the witness testified on cross-examination:

Q. And it is usual and customary to do that as far as the side of the building and back of the building is concerned, here in Cordova?

A. It has generally always been an after consideration.

(Trans. pp. 154-155.)

John Johnson, one of the workmen employed by Goodall in the construction of the building, testified:

Q. Do you know when the building upstairs was finished, that is, the building proper?

A. I couldn't say to the date. It was, I should judge, some time after the middle of April.

(Trans. p. 174.)

In view of these facts, established by testimony which stands unimpeached, there is no escape from the conclusion that the building was completed in the month of April. The circumstances under which it was constructed must, of course, be considered. Here was a mushroom Alaskan town, where business policy, particularly on the part of a tenant under a five-year lease, dictated rapid and inexpensive construction and large profits while high rental values could be maintained and until the population moved on in the wake of a new discovery. In the month of April the frame construction was finished, plastering done and plumbing and wiring installed. The street floor was immediately occupied by a wholesale and retail liquor store and the upper portion was opened as a rooming house. What better or more conclusive indication could there have been that the building was completed and that the time for filing liens had commenced to run? Clearly, the installation of trade fixtures and alteration of a few features to satisfy tenants during the following two months, involving the purchase of lumber totaling less than \$100 in cost, did not postpone the completion. Plainly, therefore, plaintiff has failed to prove the allegations in its complaint that the 6th day of September, A. D. 1910, when it filed its claim of lien, was "within and less than 30 days from the completion of said building" (Trans. p. 3). Nor is the expectation of future improvement material. When was there a building of this character con-

structed that it was not the intention of the owner or lessees to make numerous betterments and to install modern equipment in the course of time? The financial situation of McCauley and Palmer made these matters of consideration for the indefinite future. The statements of McCauley as to his intentions with the building were clearly of items of improvement which he hoped to make later on. At the time of his conversation with Mr. Stewart, manager of plaintiff—in September, 1910—the building had been occupied for five months. Separate business establishments were being conducted on the premises. Even assuming, therefore, that the lower court believed the testimony of Mr. Stewart that McCauley had used the term “complete”—although the presumption to which the judgment is entitled should compel the opposite conclusion—nevertheless, under the facts any subsequent construction would be plainly alterations and betterments. Any other view would permit an owner indefinitely to postpone the completion of a frame building of cheap construction because such a structure is continually in need of repair and may at all times be benefited greatly by additions and improvements.

Whatever McCauley may have said, it could not operate to alter the facts. Plaintiff's manager was under a duty to consider the condition of the building which was the controlling factor. Interpreted in this light, McCauley's meaning was plain. The term “complete” was ill chosen, but plaintiff would

not have been justified in relying upon it. But, be that as it may, plaintiff did not rely upon it. The statement at page 13 of the brief that plaintiff was "thus led to believe that it had an abundance of time under the law within which to file a lien" is absolutely incorrect. The conversation was early in September. On September 6th, immediately thereafter, *plaintiff filed its claim of lien*. Thus, it refused to depend upon McCauley's remark. What then becomes of plaintiff's suggestion that the judgment of the trial court "has permitted the owner to lull the material man into inaction by misrepresentations and then rewarded him for his perfidy".

It is desirable at this point to add to an incomplete statement at page 12 in plaintiff's brief as to the text of Feldman's testimony. When this witness gave McCauley a figure on the heating system McCauley told him that he would have it done *in the fall*. The conversation, apparently, took place in February, or at the latest early in the spring (Trans. p. 87).

Plaintiff asks this court to overturn the finding of the trial judge on the ground that the lease entered into between Borden and his tenants provides that the latter install a heating system in the building and that this has never been done. But the intention of the parties to the lease as to the character of structure and equipment to be contained is of no pertinence in determining later on whether the building has been completed. This fact depends upon conditions which exist at

the time when the question of completion *vel non* arises and these conditions are all-controlling. We look not to what the parties intended or expected, but what they actually did. That the heating plant as an immediate feature was abandoned by all parties is a point upon which the testimony is clear. Goodall's plans and specifications did not contain it and both Borden and his lessees recognized that its installation was a matter of future consideration (Trans. pp. 138-41). Mr. Stewart, plaintiff's manager, admitted that a heating plant could be erected in a building at any time, and is often done years after its completion (Trans. p. 64). What force, then, is to be given to the statement at page 21 of plaintiff's brief that it was "necessary to install a heating plant" in the building?

Instead of a failure to follow out the original plan in this minor particular—the heating plant—there might have been radical changes and a building constructed which did not at all conform to the specifications contained in the contract of lease; instead of constructing a two-story frame building the lessees might have constructed a brick structure of a single story. Could it be said, when all work had ceased and the building had been occupied, that until the brick was converted into wood and a second story added the structure was not completed, so that the period for filing liens would begin? The query contains its own negative reply.

The views here expressed are substantiated by the decisions.

In

Schwartz v. Knight, 74 Cal. 432; 16 Pac. 235, the construction of a dwelling house was commenced October 1, 1883. Between that date and January 1, 1884, plaintiffs furnished materials which were used in the building. The carpenters finished their work in January, 1884, and on May 10, plaintiffs filed their claim of lien. The question was whether, under the statute, the claim had been filed within 30 days after the completion of the building. The law of California at the time in question provided (section 1187, Code Civ. Proc.) as follows:

“Every person, save the original contractor, claiming the benefit of this chapter must, within thirty days after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or of the performance of any labor in a mining claim, file with the county recorder,” etc.

The terms of the section, as it now reads, concerning trivial imperfections and effect of occupation of the building were added subsequently by the statutes of 1887, p. 154. (See Deering's Cal. Code Civ. Proc., Sec. 1187, note.) The court held (at pages 433-4) that the law required the lien to be filed there within 30 days after the completion of the building, saying:

“The code does not mean that the building, if, as in this case, it was intended to be a dwelling-house, must be completed in all respects as contemplated by the plans and specifications, or even that it shall have become habitable as a dwelling. Ordinarily the lien cannot be filed until a building is so completed. But when it is made to appear that it was the original purpose of the owner to erect and build it in part only, *or that the owner, having proceeded to erect the house in part, abandoned his design of finishing it, the building should be held to be completed*, within the meaning of section 1187, from the time it was so built in part. The purpose of the owner may be inferred from his acts or omissions, but the ultimate fact to be determined is his original or substituted purpose to leave the building unfinished.”

Another case of peculiar interest here because of the attitude of the appellate court upon a finding of completion of a building is

Santa Monica Lumber Co. v. Hege, 119 Cal. 376; 51 Pac. 555.

It was there held, at page 378:

“The court finds that the building was completed July 23, 1894, but this finding is attacked as not supported by the evidence. There is no evidence in the record fixing this day as the date on which the building was completed, but, as it was sufficient for the plaintiff to show that the building was completed before the notice of lien was filed, any finding of the particular day was not essential and may be disregarded. *There was a conflict of evidence upon this issue, and we cannot say that the finding of the court in favor of the plaintiff was*

erroneous. Emerson, who worked as a carpenter on the building, testified that he finished work in the latter part of June, and that the buildings were completed 'shortly after', and that at the time of the trial the building was in the same condition as then. Naumann testified that the building was not finished on August 11th, and, as items of its incompleteness, mentioned, among others, that it had not been painted and that a sidewalk had not been constructed. It was not shown that any plans of the building were ever prepared, or that there was any test by which it could be determined when it was completed, and, in the absence of such test, its completion would be determined by the court from all the circumstances shown by the evidence."

Plaintiff asserts, at page 12 of the brief, that it was the intention of McCauley "to complete the basement for a skating rink," that he "contracted for lumber for that purpose and that this work had not been done when the lien was filed." Such was not the testimony. Mr. Stewart was asked by plaintiff's counsel whether he had agreed to furnish McCauley lumber for that purpose. But Mr. Stewart did not answer in the affirmative. Instead, he said:

A. The price was given on the lumber necessary to do that. (Trans. p. 56.)

A few extracts from the record will serve to show the true situation in this regard.

Q. (By the COURT.) Could that be done without altering both buildings?

A. There was an arrangement made with the man next, who was going to build, and they were going to make or build his basement in

such a way that he could open it out into this other basement.

Q. (By the COURT.) Would that require, would that have required an alteration in the buildings already constructed—not merely an addition, but would it require taking out and changing the work?

A. Yes, it would require taking off the siding that he put on—that portion that was below the main story floor level. (Testimony of Stewart, Trans. pp. 56-7.)

* * * * *

A. Only to this extent: In constructing the lower part of the building I could do it in such a way as to make that change any time they wanted to, later on, and framed that part of the building with that end in view.

Q. Was there any time fixed when that work was to be done?

A. No, it was only a frame—the lower wall—in such a way that they could get at it, take it down, and when Leach would build on the adjoining lot, then they would use the two basements as one for a skating rink. (Testimony of Goodall, Trans. p. 153.)

Plaintiff's Exhibit "V", at page 304 of the transcript, is a photograph of the building taken September 7th or 8th, 1910. (Trans. p. 83.) It shows that Leach's lot was still unimproved. We may leave this subject with the suggestion that plaintiff's argument is, in substance, that there could be no completion of the building on Borden's property until Leach erected his structure adjoining, Borden's wall was cut open and the basements thrown into one.

Aside from the cases cited by plaintiff, there remains but one other contention to be answered. At pages 9 and 11 of plaintiff's brief the impression is given that the building had not been wired prior to the time when defendant claims it was completed. There was no evidence in the record that this had not been done. The fact was, the building was completely wired both for lighting and telephone. However, the provision of the contract of lease which called for this, was, for reasons given above, immaterial to the point in controversy.

The cases cited by plaintiff at pages 14 and 15 of its brief are not in any way pertinent to the questions arising here. The excerpt from the opinion quoted discloses that the court was considering a matter which is not at all in point with the case at bar. The California statute makes the occupation of the building conclusive evidence of completion, so that laborers may have some guide as to the time when the period for filing liens begins. The court states this law. What logical connection plaintiff finds between this and the issue before this Court, it is difficult to understand.

The point of plaintiff's statement at page 15 that the fact that the lessee permitted persons to move into the building "did not satisfy the provisions of his contract with Borden that he would wire it and install a heat plant," is not apparent. The implied assertion here that the building had not been wired has been refuted above. The perform-

ance by the lessee of his contract of lease is not material to the question of completion. "The original contract," spoken of by the California court and Mr. Bloom in his text, is the contract for the construction of a building entered into between the owner and the general or original contractor which is required to be filed of record and subject to the terms of which sub-contractors furnish labor and material in the construction.

4. Plaintiff States Itself Out of Court.

The statute provides: "It shall be the duty of * * * every mechanic, artisan, machinist, builder, lumber merchant * * * claiming the benefit of this code, within thirty days after the completion of the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, etc." Plaintiff does not seek to base its suit on the ground that it filed its claim of lien within thirty days after it ceased to furnish materials for the building. Plaintiff alleges: "That on the 6th day of September, A. D. 1910, within and less than thirty days from the completion of said building, the plaintiff for the purpose of securing and perfecting a lien * * *

filed for record in the office of the recorder of Cordova Recording Precinct its claim thereof.” (Par. V. Complaint, Tr. pp. 4-5.)

Plaintiff’s contention that the claim was filed in time rests, therefore, upon the basis that it complied with the provisions of the statute which requires a claim to be filed “within thirty days after the completion of the building.” To be sure an attempt to urge its suit on the ground that it filed this claim within thirty days after it ceased to furnish materials would be futile, for after June 10, 1910, the only items of lumber furnished were on July 8th, 24¢, and August 6th, \$3.00. In a case very much similar to this, it was held that the delivery of two small items on the premises after some time had elapsed did not operate to extend the time in which to file a lien.

Barrows v. Knight, 55 Cal. 155.

Furthermore, it was not shown that these two items of lumber were used in the building. On the contrary it affirmatively appears that they lay in the basement for a considerable time (Tr. pp. 107, 108, 109, 167). Therefore, no lien attached for this lumber.

Fitch v. Howitt, 52 Pac. 192 (Ore.).

And in any event, even were it assumed that plaintiff’s period to file its claim of lien began upon the day when the last item of August 6th was delivered, plaintiff was still too late because its claim was not filed until thirty-one days thereafter: that

is, from August 6th until September 6th. The rule for computing the time is, to exclude the first day (the last day of service) and to include the last of the days given for filing the lien.

Horn v. U. S. Mining Co., 81 Pac. 1009 (Ore.).

There were thirty-one days in August. Therefore, to have been in time, the claim should have been filed at the latest on the fifth of September.

In order therefore to substantiate the lien of plaintiff and to establish a cause of suit, it was incumbent on plaintiff to prove that it filed its claim within thirty days after the completion of the building. The sole purpose of plaintiff's argument is to demonstrate that the building was not completed in April, 1910. In this, it is submitted, plaintiff has failed. But it affirmatively appears from the evidence that the condition of the building on September 6th, when plaintiff's claim was filed, was practically the same as it had been in April. Plaintiff itself in the brief at page 3 states that it filed its mechanic's lien "prior to the date of completion of the building". It necessarily results, therefore, that the filing was premature and furnishes no basis for a suit to foreclose. Plaintiff correctly says, page 12 of its brief: "Under the laws of Alaska plaintiff had thirty days after the completion of the building in which to perfect its lien." Therefore, if the building was not completed in April, plaintiff could not prevail; and on

the other hand, if the building was completed in April, plaintiff's right was gone.

Under statutes in various states, the terms of which are identical with those of the Alaska law, courts have held that filing a claim of lien before the completion of the building is premature and of no effect.

In

Davis v. MacDonough, 109 Cal. 547; 42 Pac. 450,

under a statute which required a claim of lien to be filed "within 30 days after the completion of any building", the Supreme Court of California held, at page 550:

"As his claim of lien was filed before the completion of the building, it was premature and gave him no right of recovery."

In

Santa Monica Lumber Co. v. Hege, 119 Cal. 376; 51 Pac. 555,

it was held:

"Unless the building was completed before the notice of lien was filed, the filing was premature and conferred no right to enforce the lien."

The same conclusion was reached in

Marchant v. Hayes, 120 Cal. 137; 52 Pac. 154;

Jones v. Kruse, 138 Cal. 613-17; 72 Pac. 146.

The statute of Kansas provided that a suit to enforce a lien should be brought within 60 days after the completion of the building. It was held in

Rice v. Brown, 42 Pac. 296 (Kan.),

that an action commenced prior to the completion was premature.

The Colorado Mechanics' Lien Law provided for the filing of a claim of lien "within 30 days after the completion of the building." It was held in

Tabor Pierce Co. v. International Trust Co.,
75 Pac. 150 (Colo.),

that a claim filed prior to the completion was premature and of no effect.

This proposition was recognized in

Mechanics' Mill Co. v. Denny Co., 32 Pac.
1073, 1075 (Wash.).

The law of Washington (R. and B. Codes, § 1134) provides for filing a claim of lien "within 90 days from the date of the cessation, etc." The court said:

"It appears that two lien notices were filed—one on March 7, 1891, which was ruled out by the court at the trial on the ground that it was prematurely filed."

This, notwithstanding the statute uses the word "from", and not "after".

5. There Can be no Foreclosure as Against the Fee.

Acting in strict compliance with the provisions of the Alaska statute, in order to protect his prop-

erty from liability for the cost of the structure which his lessees were having erected, defendant Borden posted the required notice immediately upon the commencement of the construction of the building. Plaintiff objects to the sufficiency of the notice first, upon the ground that the date from which the statutory three days' period should be computed is when Borden himself began to construct the foundation, and therefore the notice was not posted in time; and second, that the notice was not posted "in some conspicuous place upon the land or upon the building or other improvement situated thereon."

6. Same. The Time to Post the Notice Was When the Lessees Began Their Construction.

The contention of plaintiff in this behalf would require defendant Borden to have posted the notice that he would not be responsible for labor and materials while those whom he had employed personally were engaged in furnishing the same. Such an interpretation of law would lead to an absurdity and would thus violate one of the fundamental principles of statutory construction. Plaintiff here furnished some lumber directly to Borden. This was used in the foundation and plaintiff was paid for it by Borden. Assuming that upon its delivery plaintiff had found a nonliability notice posted upon the land, is it conceivable that in the face of this warning that Borden would not be responsible,

plaintiff would have left the lumber on the lot? Another instance will serve to make this even plainer: Suppose an owner intends to complete the entire structure with his own funds, but after erecting the foundation finds that he is unable to go further and is compelled to lease the land to others who are to complete the building. Suppose that more than three days have elapsed since the initial work. Plaintiff's view would make it impossible for the owner to protect his land against a liability. The statute would thus be nullified. The difficulties and absurdities which would result if the statute were construed in the way for which plaintiff contends would be even more serious where the owner's part of the construction extends over a longer period of time. The remarks of the trial court at page 209 of the transcript are particularly apt:

“If the time runs from the beginning of the foundation, as plaintiff contends, it would be absolutely impossible for him to protect himself against a lien unless he tore down the foundation or got another lot.”

But it is submitted that the statute plainly contemplates such a case as this. It gives to the owner three days' time after obtaining knowledge of the construction, *alteration or repair*, to post his notice upon “the land *or upon the building or other improvement situated thereon.*” It is thus within the contemplation of the statute that a building, either in whole or in part, may be situated upon the land at the time when the construction

for which the owner desires to avoid liability is begun. Such was the case at bar. Borden had built the foundation and for this his land was lienable. His notice of nonliability could be effective only as to the labor employed and materials purchased by his lessees. Clearly, therefore, he had until three days after McCauley and Palmer commenced to build their part of the structure in which to post his notice.

The decision of the Supreme Court of California in

Birch v. Magic Transit Co., 139 Cal. 497; 73 Pac. 238,

proceeds upon the same view. The statute at that time required the notice of nonliability to be posted by the owner "within three days after he shall have obtained knowledge of the construction * * * or the intended construction." The owner of the land had leased it, the lessee agreeing to erect a structure thereon. Although he had knowledge, through the lease, of the intended construction, the owner did not post notice of nonliability until five days thereafter, which was one day after the actual construction had commenced. In deciding that this was sufficient to avoid responsibility the court held, at page 499:

"However this may be, we think the statute should be given an interpretation that would best answer its purposes, and this can be ascertained by keeping in mind the various conditions to which the law must be applied. Contracts for the sale as well as leasing of land

conditional on its improvement by the purchaser or lessee at some future time are quite common. This contemplated improvement may be for a short period (as in the case here), or it may be for one or more years, the work not to be begun for many months, or even years, in the indefinite future, and the contract or its terms may be unknown to the laborer or material man who in this distant future is to furnish labor or material for the improvement. The owner would be charged with knowledge of the intended work as soon as he signs the contract, and under the construction contended for by the appellants he must, within three days, post his notice or lose his protection against the lien. *On the other hand, if he post such notice, it is not at all likely that it would remain posted and be conspicuous when in the future the laborers and material men would be called upon to furnish labor and material, and yet the owner would be protected.* If, however, the owner posted his notice within three days after the actual construction began the persons interested could not fail to observe it, and would govern themselves accordingly."

There is some language of contrary tenor in

Western Lumber Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 11; 108 Pac. 891,

but this was by a court of inferior appellate jurisdiction, and immediately afterward the court states that its conclusion upon the point is immaterial in view of other facts in the case. Furthermore, it is opposed to the authority of the Supreme Court of

California in a case decided six months after the Western Lumber case, viz.:

Gentle v. Britton, 158 Cal. 328, 333; 111 Pac. 9,

where *Birch v. Magic Transit Co.* is cited and followed.

And, moreover, three years before the decision in the court of appeals was rendered the law had been amended by the elimination of the words "or the intended construction or alteration or repair" (Statutes of 1907, p. 577). Under any view, therefore, the dictum in the Western Lumber case was erroneous.

7. Same. The Notice Was Posted in a Conspicuous Place.

Preliminarily, it may be stated that the purpose of the statute is to give actual knowledge to laborers and material men that the land is not to be responsible. A method is provided whereby all persons are considered, constructively, to have been notified. It is important, then, to note that before plaintiff had furnished any of the lumber for which this suit was brought, its manager had a conversation with Borden in the course of which the latter stated to him that he was putting in the foundation and that he had made arrangements with McCauley for a proposed building to be erected thereon. Mr. Stewart was asked:

Q. Don't you think that Borden mentioned to you at that time that he had leased the ground?

A. It is possible he did mention it was in the form of a lease. I do not recall exactly. (Trans. p. 58.)

The scope of Mr. Stewart's authority was such that plaintiff must be held to have known all that Mr. Stewart knew. This, therefore, if not actual notice, was at least a statement of facts sufficient to have put plaintiff upon inquiry as to the non-liability of Borden's property for lumber thereafter furnished to the lessees. Furthermore, on March first, five days after plaintiff began to furnish lumber to McCauley and Palmer, Borden stated to Stewart that he was not responsible for the construction of the building and that he had posted a notice to that effect upon the property (Trans. pp. 187-8). Stewart himself saw the notice on the following day (p. 62). Counting in the item of March first, plaintiff had up to that time furnished McCauley and Palmer lumber of the price of \$984.67. According to its own pleading plaintiff has been paid upon its account \$1243.57, but notwithstanding its knowledge of all the facts—that the statutory notice had been posted—plaintiff voluntarily continued to furnish lumber, relying upon its own legal conclusion (to use Mr. Stewart's words) that "It does not make any difference * * * If this lumber is not paid for we will put a lien on that lot all right" (Trans. p. 188).

Whether or not the notice was posted in some conspicuous place upon the property is clearly a question of fact upon which the conclusion of the

trial court cannot well be questioned. Goodall testified that it was (Trans. p. 99); that it could be seen from the sidewalk (p. 100); that it was about seven feet from the top of the snow (p. 99); that there was no other place upon the property at the time when the notice was posted as conspicuous as that which Borden selected (pp. 123-124, 128-131).

A. The structure covered the whole lot; it had to be placed on the structure. You could stand anywhere on the sidewalk and look over and see that notice. If it had been at the front, on account of the bank, you would have to get right at the railing to look over and see it. (Trans. p. 124.)

* * * * *

A. No, it could not very well be placed so you could read it from the inside, without being in my way, for the simple reason that there was only the foundation posts and sills up here to place it on so you could see it from the inside. It would be in the way of my floor joists and studding and walls and they put the sign below just enough so when I put the wall up it would not be in my way. (p. 128.)

* * * * *

Q. It could have been placed so as to face on the inside of the foundation, so that it would not interfere with the work, on some of the posts around in there?

A. Well, you couldn't then, because when it was put up there, as a matter of fact there was no inside to it. It was all open then; it was just the sills on there and the joists.

Q. It could have been put on some of those sills or joists in front of the building?

A. It could have been put on the joists—it would be covered up in a few hours. (p. 130.)

* * * * *

Q. I will ask you if in your opinion there is any more conspicuous place on that lot for posting that notice than the place at which it was posted?

A. Well, I can't think of any on that place at that time.

* * * * *

A. I don't know. You see, the foundation post is up at the front, at the sidewalk—the top of the foundation posts and the top of the sill was pretty near even with the top of the ground, and because of the slope of the hill there, there was a trench dug and the post was stuck down in there and the first post was even with the ground, and if you nailed it on the side of those posts, it would have been so low down, the snow would have obstructed the view and you would not have been able to see it. (p. 159.)

Witness Simpson testified that he saw the notice.

Q. How did you come to see that?

A. I noticed it one day. I was standing there talking to Norman McCauley.

Q. Where were you standing?

A. I was standing on the *sidewalk, where they were delivering lumber.*

* * * * *

A. Yes, it could easily be seen from the sidewalk.

Q. Do you regard it as being in a conspicuous place?

A. Well, you could see it any time you walked past there.

Q. Anybody looking for notices could easily see that?

A. Yes, I imagine they could. (pp. 168-169.)

Witness Johnson was a workman on the building. He saw and read the notice. It was discussed at the rooming house where he was stopping (pp. 170-171).

Witness Slater also saw the notice. He testified that it was easily seen from the sidewalk and that it was in a place sufficiently conspicuous so that a person walking across the street and glancing toward the building would be apt to see it (pp. 174-5).

The defendant Borden was asked why he selected the particular place at which the notice was posted. He gave as his reasons the following:

A. One reason I didn't place it on the back of the lot was there was never anybody out there. Then I didn't place it on the front of the lot because it would have been—would not have been in a place that I would consider a conspicuous place. It would have been necessary to lean over the railing if I placed it on the front of the foundation—lean over the railing of the sidewalk and look down and one could only see the top edge of the board. I placed it on the side because the paper was white and the reflection of the sun would show the paper up very clearly. I didn't place it on the north side of the building and nail it to the Boyle drug store because when the sidewalk was closed I did not want it to interfere with the 2x6 joist. I didn't want to place it on the wall of the Boyle building because after the floor was laid, I knew that an upright would be placed against that building and press right up against it, and I thought one of the uprights might touch the frame and if it came between the frame, it might be concealed as

the inside wall was concealed, and I wanted it to be exposed, not only at the time that the work was commenced, but I wanted it to be in a place where it could be seen continuously for a number of days afterwards—in fact, I wanted it to be where it could be seen throughout the entire construction of the building. (pp. 182-3.)

* * * * *

Q. Was there any place at the top or about the top of the front of the foundation where you could have posted that notice, that it would not immediately have been interfered with by the work on the superstructure?

A. On the foundation, at the front?

Q. Yes, around the top of it?

A. They were piling lumber around there and the snow frequently concealed the ends of the stringers, sometimes called capping. There were three rows of posts running from the front of the lot to the back of the lot, one row on the north side, one on the south side and one from the centre, and the end towards the street of those caps or stringers was partly concealed, sometimes by snow which was sliding down when the lumber was slid underneath the sidewalk. (p. 185.)

The photograph (p. 304) taken five months later shows the notice still in place.

In the face of this evidence plaintiff asks this court to set aside the finding of the judge below that the place which Borden selected was conspicuous. Let us examine now the argument offered in support of the attack upon this finding. Plaintiff quotes, at page 17 of the brief, the following testimony of Mr. Stewart:

The only way to get at it was to get a ladder and climb down from the sidewalk and

travel around the block to the rear of the building and come along upon the ground under the building.

The testimony, however, shows conclusively that this was not a fact. The place where the notice was posted was accessible by the same route that all the men employed upon the building used to go upon the job. The steps to the theatre led to the surface of the ground underneath the sidewalk, which was city property. By walking upon this property across the front of Borden's foundation one reached Leach's adjoining lot. Midway between the front and the rear of the foundation was the notice (see Trans. pp. 118, 125, 186, 198, 201).

Borden described the manner in which he posted the notice as follows:

Q. When you posted this notice down there, how did you get down to it?

A. I went down the theatre stairway until I reached the foot of the stairs; then I turned to the left and went down three or four crude, very rough steps that were in a rather dilapidated condition.

Q. On whose property were those steps?

A. I think they were on the city's property, on the sidewalk, as I understand it.

Q. On the sidewalk in front of Lot 21?

A. I don't know exactly. Most of those steps are on the sidewalk.

Q. Did you cross the lot, cross the face of that lot?

A. I walked south in front of the lot until I came to the southeast corner and then turned to the right.

Q. That was the natural way to get to the point where you placed this notice?

A. That was the natural way. (p. 198.)

The statement at page 18 of plaintiff's brief that at the time it began to deliver lumber "the notice was eleven feet from the ground", is confusing, for covering the ground was at least four feet of snow, so that the notice was a few inches above the head of a man of ordinary size standing along side of it and was therefrom easily legible (pp. 127, 171, 181-2).

Plaintiff seems to make a point upon the fact that the notice could not be *read* from the sidewalk (brief, p. 17). But the statute calls for a notice and not for a sign-post or placard. Surely there can be no complaint upon the score that the notice was in typewriting and that the characters should have been larger. Such is clearly not the theory of the law.

Mr. Gilbert, who testified for plaintiff that he did not see the notice and would have if it had been posted in a conspicuous place, was asked what he would consider a conspicuous place upon the property. But he could offer no suggestion and was content to reply "anywheres where it can be seen by anyone coming on the property" (p. 115). He stated further that before he went to work he did not pay any particular attention to the building because he had no reason to do so (p. 116). When Mr. Stewart was asked what would have been a conspicuous place he replied "They could have made a

conspicuous place” and suggested that it might have been put on the sidewalk where the lumber was being delivered (p. 86). But he was mistaken in this because the sidewalk in front of the building and for a short distance to one side was blocked because of danger, and had it been placed there no one could have gone close enough to the notice in order to ascertain its contents (pp. 124, 184, 196-8-9). There was a great hole in the street so that the walk could not have been approached from the street (see 117; photograph p. 317). Further, the walk was partly removed, the ends of the planks being sawed off and then the remainder torn out during the first part of the construction (pp. 149, 150); the railing had been removed (p. 161). Moreover, the statute requires the notice to be posted upon the property. Therefore, had the notice been attached to the sidewalk the requirements of the law would not have been fulfilled.

Plaintiff has cited the case of

Nottingham v. McKendrick, 63 Pac. 822
(Ore.),

but the facts there were not at all similar to those at bar. Quoting from the opinion (823-4):

“The court below found, in substance, that at some period during the time the work was being performed on the building the defendant Dammeier posted a notice upon one of the partition walls to the effect that neither she nor the owner of the legal title would be responsible for any work or material furnished, but that such notice was not posted, nor intended to be posted, in a conspicuous place upon the building

or land, nor was it posted within three days after the defendants obtained knowledge of the work and repairs being done by the defendant McKendrick under his contract with Trummer. This finding is abundantly supported by the testimony. Mr. Dammeier, the agent of the defendant Dammeier, testified that Trummer, the lessee, objected to a notice being posted in a public place, and, in deference to his wishes, it was put on a partition wall, several feet back from the street. Mr. Nottingham said that he was careful to observe whether a notice had been posted, but did not see any."

Aside from the different state of facts before this Court, it should be noted that the finding of the trial judge against the sufficiency of the notice was held, in the Oregon case, to be justified by the evidence. Not only has the finding here abundant support in the testimony, but further, it would seem that there could have been no other reasonable conclusion than that which the lower court reached. This discussion may well be closed with the words of the judge before whom the case was tried:

"Regarding the notice, whether it was posted in a conspicuous place or not, the Court concludes that it was. There must be taken into consideration in this case that the lot itself was not conspicuous—it was 25 feet below the sidewalk and any one might go along there and never see the lot. If you posted your notice up 25 or 30 feet in the air so you could see it from the sidewalk, a man might say it was not conspicuous from the lot, from the surface of the lot. It would not have been conspicuous anywhere on the surface of that lot from the sidewalk. It could not be read any more plainly from the sidewalk if it was anywhere on the

surface of the lot in ordinary writing or type-writing than it can where it is. The argument does not appeal to the Court that someone would have to be guilty of trespass to get around on the outside of the building to read this notice. The building covers the lot, and it was plainly posted on the only exposed outside wall of the foundation. If it had been on the inside wall, it would be soon covered by the flooring and be in the dark and come directly within the rule of the case cited by Mr. Boryer where the notice was posted in a recess of the partition wall. It might then have been more conspicuous at first, but its purpose is not limited to the beginning of the work. "Some conspicuous place" is all that is required, not the most conspicuous place."

(Trans. pp. 210-11.)

8. Same. Compliance With the Statute Protected Borden's Property.

In the last few pages of plaintiff's brief a curious contention is made. It is urged that notwithstanding Borden may have acted in strict compliance with the terms of the statute, nevertheless, because of the provisions of the lease the lessees were Borden's agents for the construction of the building, and he is, therefore, liable. That is nothing more or less than an attempt to nullify the Alaska statute. Section 694 of the Compiled Laws of Alaska (1913), provides that the building shall be held to have been constructed at the instance of the owner and his interest subject to a lien unless he shall "within three

days after he shall have obtained knowledge of the construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing", etc.

Under a similar state of facts this Court in

Cascaden v. Wimbish, 161 Fed. 241,

has explained the meaning of the Alaska law as follows (p. 244):

"If the work is done for a lessee of the property, liability is confined to the leasehold estate, if the owner had not knowledge of the construction of the improvement, or if, having such knowledge, he gave notice that he would not be responsible. Such a construction gives effect to all the provisions of the law, and is the construction given to similar statutes in California, Nevada, and Oregon."

In support of its contention plaintiff cites several cases which we now proceed to examine categorically.

Hall v. Parker, 94 Pa. St. 109.

A reading of the opinion there discloses that there was no statute in Pennsylvania at that time providing for the protection of the owner of the land by posting a notice of non-liability. The owner there stated verbally to the lien claimant that he would not pay for anything (see p. 112). But, of course, in the absence of a provision in the law making it possible to exempt his interest in the property he was nevertheless liable. That the law of Pennsylvania was entirely different from that of Alaska as contained in the statute, is apparent

from the following quotations from the opinion of the Pennsylvania court (p. 111):

“Where, however, the tenant contracts with the landlord to build, or to add to or repair buildings, for compensation to be made by the landlord either in money or the occupation and use of the premises, he is, in the first instance, under the general statute, and, in the second, under the special one here properly regarded as an ordinary contractor to build or repair. He is the landlord’s agent holding possession for him, building and repairing for him, at his ultimate cost; and the building is liable to lien, as in all other cases of building or repairing by contract. Occasionally such contracts have been inadvertently called improvement leases, but they are not, in the ordinary meaning of that term. * * * In the case before us the tenants contracted to make the repairs and addition during the first year, in consideration of the low rent for that time. In other words, in consideration of receiving the use of the premises for that year rent free, for the rent required to be paid is but nominal—\$5. The annual value of the premises is fixed by the parties at \$600. \$595 is therefore the sum which the landlord agreed to pay for the repairs and additions.”

What advantage plaintiff hopes to gain from the citation of the case of

Moore v. Jackson, 49 Cal. 109

(incorrectly cited as “48 Cal. 111”), it is difficult to see. For it was plainly set forth in the preliminary statement of facts (pp. 109, 110):

“Jackson did not give a notice that he would not be responsible for the repairs.”

The argument of the attorneys for the successful plaintiffs, briefed at page 110 of the report, is devoted entirely to a statement of the contents of the Act of March, 1868, which provides that the land shall be liable unless the owner shall within three days give notice that he will not be responsible by posting a notice in some conspicuous place upon the land. It is then said (pp. 110-11):

“Jackson failed to post any notice upon the premises, that he would not be responsible for the alteration and repairs. If he wished to escape the liability resulting from section four, it was his duty to post a written notice on the premises, as soon as it came to his knowledge that repairs were being made or had been made thereon.”

Otis v. Dodd, 90 N. Y. 336.

This decision was based upon a local statute of New York, which differed radically from the law of Alaska. There was no provision for the protection of the owner of the land against liability. The following quotation from the opinion (p. 340) makes this clear:

“Under the statutes, whenever the owner of land consents to the erection of a building upon it, a lien is given to persons furnishing materials used in its erection; it was not necessary that the owner should have contracted for the materials and however manifested, the consent of the owner to the erection of the house is sufficient.”

The court said further (p. 341):

“We believe they (authorities cited) have truly interpreted the intention of the legisla-

ture. If the statute is mischievous and impolitic, its operation must not be thwarted by the courts, but its amelioration must be left to the legislature."

Henry v. Miller, 145 Ill. App. 628.

There was no provision in the Illinois statute permitting the owner of the land to exempt it from responsibility by posting a notice. The plaintiff was there held entitled to a lien under "the terms of the statute, which provides that, the person furnishing material or performing labor under contract with the owner, or with one whom such owner has authorized or knowingly permitted to contract for the improvements, shall have a lien" (p. 630).

The law of Washington contains no such clause as that in the statute before the Court. A reading of the opinion in

Kremer v. Walton, 11 Wash. 120; 39 Pac. 374,

clearly shows that the case is not applicable:

"It follows from these facts and from the decisions of this court that, if the building was to be erected by the lessee himself, his interest as such lessee would be all that could be subjected to liens for work and materials furnished for said building. See *Z. C. Miles Co. v. Gordon*, 8 Wash. 442, 26 Pac. 265. On the other hand, if, by the terms of the lease, the building was to be erected and paid for by the lessor, he would be the one who was erecting, even although the lessee was to have the direction and control of the erection. In our opinion, the terms and conditions of the lease were such that it must be held that the build-

ing was to be erected by the lessor. It is true that, by its terms, the building was to be erected and paid for by the lessee in the first instance; but the lessor was to repay to the lessee the cost thereof, and for this reason it must be held that he assumed the same responsibility that he would if he had let a contract to a stranger for the erection of the building, under conditions which required him to fully pay the cost thereof before having the right to demand any payment of the owner."

In the case cited in the opinion (*Miles Co. v. Gordon*) it was squarely held that the lien for labor and materials could extend only to the right of the lessees at whose request the work was done and materials furnished—a leasehold interest.

Western Lumber Co. v. Merchants' Amusement Co., 13 Cal App. 4; 108 Pac. 891.

This case, incorrectly cited as "*Miller v. Amusement Co.*" was decided against the owner notwithstanding his notice of nonliability because of the particular feature which plaintiff omitted to mention and which the court at page 11 expresses as follows:

"The evidence justifies the finding that Gager (the owner) was himself merely using the corporation (the lessor) as an instrument to carry out the venture in which that body was engaged. * * * If it were alleged that Gager was the owner and the evidence disclosed that the work done was done in the name of a corporation, which he organized and controlled and through which he acted, a finding that he acted through such corporation as his agent would be sustained."

The two Missouri cases,

O'Leary v. Rowe, 45 Mo. App. 507, and

Lumber Co. v. Churchill, 90 S. W. 405,

are, like many of the others, distinguishable upon the ground that the Missouri law contained no provision for exemption of the owner's property by posting a notice of nonliability.

9. The Claim of Lien Was Void.

The notice of plaintiff's claim of lien filed by it in the office of the recorder of Cordova precinct, contains the statement that the value of materials which it furnished and for which it was entitled to a lien was \$3480.36, and that after deducting all credits and offsets there was due thereof the sum of \$2236.57. The evidence showed without contradiction that two of the items furnished July 8 and August 6, for which a lien was claimed, were not used in the building. For these, therefore, plaintiff was not entitled to a lien. Under the Oregon law if lienable and nonlienable charges are lumped together the entire claim is void.

Williams v. Toledo Coal Co., 25 Oregon 426;

42 A. S. R. 799, 802.

“An account containing a lump charge, in which is mingled an item for which no lien is given, will not support a lien; and the defect cannot be cured by oral evidence, by means of which the items for which a lien is given may be separated from those for which a lien

is not given. 2 Jones on Liens, Sec. 1419. In Dalles Lumber etc. Co. v. Wasco Woolen Mfg. Co., 3 Or. 527, it was held that a corporation incorporated for the purpose of manufacturing and selling lumber could not acquire a lien for labor, and that having joined in a lumping charge a claim for labor, and that of material, no lien was thereby created."

Hughes v. Lansing, 34 Oregon 118; 75 Am. S. R. 574, 579.

"It is claimed that some of the lumber obtained and used by Plummer & Ault in Lansing's building was furnished after the waiver, and that the lien for the price thereof could not be affected thereby. But however that may be, it is utterly impossible to segregate the lienable items, if such they be, from the non-lienable items in the account set forth in the claim of lien, which is therefore unavailing for the purposes intended. *Williams v. Toledo Coal Co.*, 25 Or. 426; 42 Am. St. Rep. 799."

That this was not one of the grounds of the decree of the lower court is not material. A fundamental rule of appellate practice is that if a decision is correct for any reason appearing in the record, it will be affirmed although it was based upon another, and even an incorrect ground.

10. Plaintiff's Plea for Equity.

A few pages of plaintiff's brief are devoted to a discussion of the equities of the situation. Plaintiff would have it appear that the defendant Borden has been unjustly enriched at plaintiff's expense

and that therefore equity should compel him to pay the cost of lumber which he did not purchase and for which as a matter of law he is not responsible. Let us assume for the moment that the facts are as plaintiff paints them. But Borden has asked no relief at the hands of this Court so that he should be compelled to do equity. Plaintiff is the actor here and its demand is purely legal in character. Equity is the forum merely because of the remedy by which plaintiff seeks to enforce its asserted claim, to wit, foreclosure. It is not because of any peculiar equity that is inherent in the position of a mechanics' lien claimant. Plaintiff asserts an alleged right which is given by statute in derogation of the rules of the common law. And in the establishment of that right it must prove substantial compliance with the statute in every particular before it is entitled to take Borden's property in payment of an obligation which Borden never incurred.

Moreover, the record shows that the facts are not as plaintiff states them. Defendant Borden has received nothing to which he was not entitled. On the contrary he is in a decidedly worse position than he would have been if McCauley and Palmer had performed their contract of lease. Under it Borden was entitled to the building at the conclusion of the term, and in the meanwhile to a rental of \$75 per month. The testimony shows that in March, 1912, shortly after the bankruptcy proceedings the building became vacant (Trans. p. 136). From that time on Borden received no rent

whatever; the premises were unoccupied at the time of trial (Trans. p. 194), and since then the fact is that he has received nothing from the property. Furthermore, Borden paid Goodall the amount of his claim against McCauley and Palmer for the construction of the building (pp. 131, 141). He also paid \$200 to Gilbert—the lessee's debt for plumbing installed (p. 114). The value, if any, of this unoccupied building on Borden's land is surely not to be measured by its cost. It is clear, therefore, that the statement that Borden has profited by the failure of his lessees is contradicted by the record.

11. Conclusion.

It is submitted that under the facts and the law there can be no recovery whatever in this suit. Borden's interest in the land was properly protected. Plaintiff's claim against the leasehold interest of those at whose request it furnished lumber, which under a proper case would entitle it to be subrogated to the position of the lessees (Laws of Alaska, Sec. 692) cannot be maintained, first, because its claim was not filed in time, and further, because it was void from the beginning. It therefore results that the decree of the lower court should be affirmed.

Respectfully submitted,

J. C. CAMPBELL and

DAVID L. LEVY,

Solicitors for Appellee.

TABLE OF CONTENTS.

Section	Page
1. Was the Building Completed?.....	2
2. The Effect of Posting the Notice of Nonliability..	16
3. Same. California Decisions on the Point.....	17
4. Same. Construction by South Carolina Court of Similar Legislation	22
5. Same. The Minnesota Decision.....	24
6. Same. Other Cases Cited are Decided Under Stat- utes Which are Distinguishable. New York De- cisions	26
7. Same. The Missouri Cases.....	31
8. Same. The Illinois Cases.....	35
9. Same. The Washington Cases.....	37
10. Same. Other Decisions Cited in the Opinion.....	38
11. Review of the Argument Thus Far.....	40
12. Statement of Purpose of Argument to Follow.....	41
13. Cases Opposed to the Decision of This Court.....	42
14. The Equity of the Situation.....	54
15. The Direction for a Decree for Plaintiff.....	55
16. Same. There is No Finding of the Amount Due Plaintiff	57
17. Conclusion	58

No. 2202

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARCTIC LUMBER COMPANY

(a corporation),

Appellant,

vs.

W. H. BORDEN, GEORGE GILBERT,

CHARLES GOODALL, NORMAN

McCAULEY and C. W. PALMER,

Appellees.

APPELLEES' PETITION FOR REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Defendant W. H. Borden respectfully petitions that the decision of this Court herein be set aside and rehearing of the cause granted. In support of this application, defendant offers an analysis of the opinion of the Court viewed in the light of the facts of the case, and submits that further con-

sideration should be given to two features of the decision:

(1) That the building was not completed more than thirty days before the claim of lien was filed.

(2) That under the Alaska Code the privilege of exemption from liability by posting a notice on the property cannot be invoked by an owner who leases his land under a contract which requires the lessee to make the improvements.

(3) The direction in the order of this Court that a decree be entered for the appellant.

Let us proceed to a consideration of the opinion.

1. Was the Building Completed?

This Court has concluded that in finding that the building was completed in April the trial judge committed an obvious error in applying the evidence. The basis of this conclusion is epitomized in the following statement:

“The Court assumed from the fact that the heating plant was not included in the contract which the lessees made with Goodall, a carpenter and builder, for the construction of the building, and from the fact that the lessees postponed the installation of the heating plant, that the agreement between the lessees and Borden had been changed.”

That this statement is fraught with misconception of the theory upon which this case was decided in the lower court may be attributed to the absence of any full discussion thereof in the briefs and

to the fact that, owing to the failure of plaintiff company to appear, the case was submitted without oral argument and thus the opportunity to crystallize the issues before the Court was lost. It is particularly this aspect of the matter which would seem to make a reconsideration of this case imperative.

Returning to the statement quoted, the trial judge did not make the assumption that the lease had been changed. Furthermore, the two factors said to have been the grounds of the assumption played but a small part in any of the reasoning which led the court to decide in favor of the defendant. The finding was that the lessees "after the execution of the lease abandoned the plan of installing a heating plant," (Trans. p. 221) and that "the building was completed on the 14th of April" (Trans. p. 219). If these involved an obvious error in applying the evidence, they should be overthrown. But defendant is surely entitled to a consideration by the Court of these findings and not of an assumption of the trial judge which was not in fact made.

It is proper at this point to consider the reasoning advanced in the opinion in this connection so that it may be demonstrated that not only does it present a case of *ignoratio elenchi*, since it is offered to disprove not the actual finding but another which, though resembling, differs from it, but further that it has no force in respect to the real issue.

There is first mentioned Borden's testimony that the lease had not been changed. From what has been said it is clear that this is immaterial because the decree of the lower court was not based upon a change in the lease. There was nothing to prevent the lessees in point of fact from failing to perform their obligations under the lease in any particular. To be sure, it was a breach of the lease and empowered Borden to terminate it, but he did not exercise this right and therefore, for the time at least, waived it. To attach any importance to the fact that this covenant in the lease was still in force is to assert that it would have been material if Borden had released McCauley from this obligation. How such action on Borden's part—utterly without logical connection with the matter of actual construction—could have affected the completion of the building, it is difficult to conceive.

The opinion next points out that "Goodall's contract was limited to the construction of the building only," not including plumbing, heating plant, or several important features of the lease. A comparison of the lease with Goodall's contract shows that these other features were electrical wiring and plastering. It is respectfully suggested that the Court's reference to Goodall's contract in this connection indicates that it has misunderstood the point of the finding of abandonment of the original plan. It appears affirmatively that this Court has overlooked the most important feature of this aspect of the case—that Goodall drew the plans and prepared the specifications of the building in

every particular and that the heating plant had intentionally been omitted. The contract with Goodall for carpentering work was not a factor in the reasoning of the trial judge; it was his plans and specifications. It is plain from the opinion that testimony of manifest import amply supporting the finding of the trial judge has been overlooked by this Court notwithstanding that it was set forth in extenso at pages 9-11 of the brief. It is therefore quoted again here:

Q. The contract you had with them for the purpose of constructing this building calls for plans and specifications. Where are those plans and specifications?

A. Well, I don't know where they are now. I had the plans and when I was through with the building I had no further use for them. I looked for them but I couldn't find them.

Q. Your plans and specifications called for a building in the rough—putting up a building in the rough?

A. Finished as it is now.

Q. Were you to do the plastering?

A. Well, no; I was not to do the plastering, but they hired me to look after it and let the contract for it—look after the plastering and superintend it.

(Trans. pp. 138-39.)

* * * * *

Q. And you didn't have a contract for the putting in of the plumbing, did you?

A. No.

Q. Who had that contract? A. Feldman.

(Trans. p. 139.)

* * * * *

Q. I mean in the plans and specifications—was that shown on your plans and specifications?

A. Yes, it showed the plumbing, the wash-basins and everything showed. There were changes made after we got the partitions all set and everything. We probably made some changes in some of the wash-stands, moved them to more convenient places in the rooms, but it was shown in the plans all right.

Q. On your original plans?

A. On the plans that Elliott worked by; yes, sir.

Q. And that was on the plans and specifications which were attached to your contract?

A. Well, I drew the plans and the contract was there—they were not attached together; they belonged to the same plans we worked by and finished by.

Q. Your plans and specifications showed where the wash-basins, etc., were to be placed?

A. Yes.

Q. And where the radiators were to be set?

A. No, no radiators.

Q. It didn't provide for the radiators?

A. No, there was no radiators. It didn't provide for any steam-heating plant.

Q. Your plans and specifications did not?

A. No; for the reason that I didn't think it was the intention to install any steam-heating plant at that time. That was to be a consideration to come in later on. They didn't intend to put in any heating plant right then.

Q. Right when?

A. At the time the building was constructed. They thought they would probably do that later on.

Q. What do you mean by later on?

A. Well, whenever money, finances, would allow it, I think.

(Trans. pp. 140-1.)

Goodall was thus not only the contractor for all the carpentering work but also the superintendent of the entire construction, under whose supervision the contracts were let and according to whose plans and specifications the building was erected.

The opinion next quotes some testimony in reference to Borden's statement that "McCauley had agreed he would put in a steam heating plant at some future time." This in itself shows that the provision of the lease in this connection was not being pursued and that Borden had accepted the situation. Two further references to the record are made in the opinion: McCauley's statement to plaintiff's manager as to the kind of structure to be erected, and Borden's letter to Feldman in July, 1910, in which he held out to Feldman the inducement for employment when the heating plant should be installed. The first is nothing more than a statement of the terms of the lease, with which McCauley undoubtedly expected at the outset to comply. Not only is it not material, but it is entitled to no weight, in view of the admission of Mr. Stewart, plaintiff's manager, that a heating plant could be placed in a building at any time and that this is often done years after its completion (Trans. p. 64). The second was merely an expression, after three months of occupancy, of Borden's hope and expectation that the building would some day be improved by the installation of a heating plant as originally intended—a fatuous hope in which, nevertheless, he persevered until McCauley's insolvency stifled it. Intrinsically, the remark has

no weight; moreover, it was made to a third party and therefore cannot be said to have influenced the plaintiff in any way.

But these matters of intention have no logical force where the intention is changed. A building must be constructed according to some plan. To determine whether it has been completed resort may be had only to that plan. The plan here was not the original intention of the parties as expressed in the lease; that had been given up and a new one substituted. The former must be disregarded in the logical process, otherwise the result obtained is logically false.

The ultimate conclusion which the Court reaches is "that the installation of the heating plant was deferred for a short time." While the term "short" is a comparative one, it can hardly be used to designate the period for which this contemplated betterment of the structure was postponed. In the month of May, when the building had been fulfilling its purpose to its full capacity and two business activities had been carried on within it for a month there might have been some ground for the belief that a heating plant was soon to be installed. But in September, when five months had elapsed, was such a belief still reasonable?

However, assuming that it was, the conclusion of the Court begs the real question. It involves the assumption that the heating plant was a part of the plan of the building. In order that the omission of any feature of a structure may be

considered a postponement of its completion such feature must be contained in the plan. The Court has ignored the full and complete plans and specifications drawn by Goodall and pursued to the letter in the work of construction. It has taken as a guide a single paragraph of the lease specifying generally the size of the building and a few features of equipment. It will hardly be said that any builder could have taken this as the basis of his contract.

The value of a general or original building contract as the means of determining when the building is completed lies solely in the fact that it contains the plans and specifications of the structure. But on the face of the opinion it appears that this Court has used the meager provision in the lease as the gauge. There are cited two authorities in its support:

Avery v. Butler, 30 Ore. 287;

Crane Co. v. Ellis, 58 Ore. 299.

The extract quoted from the first decision substantiates the very contention which we have advanced here: "The terms of the original contract" are made the determining factor and it is held that until omitted work demanded thereby is supplied and "while there is anything to do which it is the duty of the builder to perform under the terms of the contract," the building is not completed. It is further noteworthy that the Court held that when the building had been accepted as completed, the time to file liens began, and that

the subsequent removal by the contractors of defective doors and windows and substitution of others did not postpone the completion of the building—this, notwithstanding that the last work on the day of acceptance was done December 19, 1892, that the notice by the architect of the rejection of the defective work was given the day before, that he notified them again January 16, 1893, “to proceed to *complete* the work on the residence you *are building*,” and that the changes were then begun and completed April 30th.

The same is true of the case of *Crane Co. v. Ellis*. The Court held that whatever work was done after completion of the cement floor was repair and not construction. The cement floor was provided for in the plans and specifications contained in the contract. The decision thus lends further support to the contention we are making here—that the plans and specifications and not the lease must control. Upon its face the decision in the case at bar is inconsistent because the terms of the lease are made the deciding factor and immediately following are cited cases which hold that the terms of the building contract control.

The consequences to which the rule laid down in the opinion of the Court would lead should not be overlooked. An owner of land who leases it, receiving the lessee’s agreement to construct a building upon it containing certain features would be at the mercy of contractor, laborers and material men, in the event that the lessee should omit any

stipulated feature from the contract for the structure actually to be erected. Under the authority of the case at bar, if the decision is permitted to stand, the building would be held uncompleted until the omitted feature should be installed. The owner would be deprived of the right—secured to him under the theory of mechanics' lien laws everywhere—to have claims against his property made known promptly. The state of his title would be uncertain since the land would be subject to the imposition of a lien which would operate as of the date when the work of construction was begun and thus cut in ahead of a conveyance or mortgage in the long and indefinite intervening period. Latent in the decision is the assertion that since the heating plant is still lacking the building, after successive tenancies and years of vacancy, is still uncompleted.

But it is submitted that such is not the law. The principle which it would seem from the opinion this Court has unwittingly declared, is opposed to the reason of all the authorities, including those cited in its support.

The opinion contains this further statement: "The building was incomplete in that upon one side it had not been covered with cedar siding, and that it had been but partially painted." It is respectfully submitted that there is not a word of testimony to support this assertion. Aside from the general knowledge of the rough character of structures erected in a new Alaska town, aside

from the proof in this behalf plainly afforded by the photograph of the block in which the building in question was constructed (Trans. p. 317), there were these conceded physical facts: the structure completely covered Borden's property (Trans. p. 124); it was built flush with the building occupied by the Boyle drug store on one side (Trans. 182), and on the other side was Leach's lot upon which he expected shortly to build flush with McCauley's structure so that the two basements could be thrown into one to make a skating rink (Trans. pp. 56-7, Testimony of Stewart; p. 153, Testimony of Goodall). The rear of the building was on the swampy tundra flats facing the bay (Trans. pp. 103, 1022). The water line was but a few feet away. Clearly, it was a physical impossibility to paint the side of the building next to the drug store. It would have been a waste of material, time and money to have painted the rear—no building on the block afforded this—or the side against which another structure was soon to be placed. The photograph shows (not very plainly, but such is the fact) the side of the building across the street before which is the sign "Turkish Baths," rough, unpainted lumber. The sides of practically all the structures in the block and the front of at least one were unpainted. As to the cedar siding, the statement in the opinion that all but one side had been so covered might lead one to the conclusion that the remainder was to be covered before the structure should be completed. But this was not the fact. No cedar siding at all had been used.

None was intended. The drug-store on one side and Leach's contemplated building on the other made cedar unnecessary so far as the sides of the structure were concerned. Surely, the expense would not be incurred for the rear. The front was composed of finished lumber and plate glass. Where was there place for cedar siding? The photograph shows the "Turkish Baths" building with ship-lap exterior. No structure in the town at that time afforded cedar siding. And of most importance are the facts that the lease itself did not call for cedar siding, and on the contrary, the plans and specifications provided that "building paper and one thickness of ship-lap is to be placed on the outside of studdings." The building was so constructed. It is submitted that defendant is entitled to a more careful consideration of the facts of the case than is afforded by the opinion of this Court.

Thus far we have undertaken an analysis of the reasons which led this Court to conclude that the trial judge committed an obvious error in applying the evidence in his decision that the building was completed in April. These reasons do not withstand the acid test. The course pursued in the opinion in demonstrating the asserted obvious error of the trial judge is also open to criticism. Those facts of the case which were plainly the basis of the decision below are ignored; those which were used at trial to persuade the court below to the opposite conclusion are dwelt

upon. It was proved that at the time the claim of lien was filed the building had been completely occupied for a period of five months by two different establishments—a liquor store on the lower floor and a rooming-house above. It was proved that the owner of the land, the superintendent of construction and one of the laborers who had been continuously on the job, (Trans. p. 174) considered that it had been completed in April. It was proved that the plans and specifications of the building had been pursued to the letter. The structure stood in the month of April as the physical representative of what those who procured its erection intended. The trial judge was personally acquainted with the building and with the class of construction prevailing in the town. He decided that the structure was completed. Whatever force the other features of the case may have had, they served but to present a conflict—not on the score of the veracity of witnesses—but of the evidentiary weight of facts. Can it be said that in reaching a conclusion which has such strong support in the evidence the trial judge committed obvious error? He considered the acts of the parties as the determinative factors, he refused to be swayed by what Mr. Stewart said McCauley had told him of contemplated features of the building, and attached more importance to the plans and specifications which were actually adopted. That their adoption constituted in itself an abandonment of the former purpose of installing a heating plant as a part of the *construction* must

be plain. The building as actually contemplated would be complete without it. If the expectation of eventual installation continued, it could not have been as an integral part of the construction, but as a subsequent betterment. In testimony of this, it is to be noted that the heating plant has never been installed. Can it be said that, therefore, after these years, the building is still uncompleted?

Thus, there is not a single fact in the record which when considered in light of the attendant circumstances is inconsistent with the conclusion of the trial judge. Not only did he not commit obvious error, but any other decision than that which he reached would have been opposed to weight and meaning of the evidence.

We quote the language of the Supreme Court of Oregon in a case the facts of which though not strictly analogous, are of interest here.

Schade v. Alton, 121 Pac. 898.

The owner moved into the building November 2. The plaintiff in order to bring the filing of his lien within time contended that the dwelling was not completed until in December when the sewer pipe connected with the house was uncovered so that the city inspector might examine it. But it was held that this was "not construction work and did not operate to postpone the completion". The Court quoted from an earlier Oregon decision:

Sarchet v. Legg, 118 Pac. 203,

where the lien claimants relied upon the unfinished state of certain electrical and cement work as postponing the completion of the building. It was held:

“The house was substantially completed when it was completed, and the lien claimants by vigilance could have discovered that fact; but they waited, expecting to receive their pay from Ridgen, and, after learning that he had absconded, they seek to establish claims against the property; but as they were not watchful they are not entitled, under the circumstances detailed, to liens, and hence the decree is reversed, and their several suits dismissed.”

2. The Effect of Posting the Notice of Nonliability.

In deciding that the notice of nonliability did not exempt Borden's interest in the property from the lien this Court has held:

“The provisions of Section 265 are for the benefit and protection of the owner in cases where the work is not done and the material furnished at his instance, or at the instance of his agent.”

Introducing as it does a new element into the system of mechanic's lien legislation, this provision, which is common as well in the western states, cannot be considered as a codification of formerly existing principles. As this Court has held, it was enacted for the benefit and protection of the owner of land. But if that benefit and protection are to be limited to the cases mentioned in the above quotation—the term “instance” being considered to include the situation at bar—the statute will operate not as a benefit at all but rather as a

burden. For where the erection of the improvements bears no contractual relation, direct or indirect, with the owner, surely the interest of such owner is not subject to the lien. According to the opinion, therefore, the owner is not aided by this new provision. On the contrary he is required promptly to post his notice in a conspicuous place in order to be relieved of responsibility for an improvement with which he has no contractual connection. Upon principle and authority, it is submitted, such is not the purpose of the statute.

3. Same. California Decisions on the Point.

The Alaska law has been held by this Court to be similar in this respect to that of California, Oregon and Nevada.

Cascaden v. Wimbish, 161 Fed. 241, 244.

Inasmuch as section 265 of the Alaska Code is peculiar to these states, and sections 262 and 265 are practically reproduced in the statutes of California (C. C. P., sections 1183 and 1192), the decisions of its highest court should be consulted for precedents. Liability of an owner who has leased his land under an agreement requiring the tenant to construct a building has been considered by the Supreme Court of the State of California and the provisions of the nonliability held applicable. In

Birch v. Magic Transit Co., 139 Cal. 496,
73 Pac. 238,

it was decided that by posting the notice the interest of such an owner was exempt from the operation of the lien. While the gist of this case was stated in defendant's brief, the opinion of this Court contains no reference to it. Therefore we offer a short analysis here.

"The late Adolph Sutro was the owner of the land, and on April 9, 1896, leased the premises to defendant John M. Weir, for the purpose of erecting thereon a scenic railway, and Weir agreed to complete it within fifty days or pay a forfeit for each working-day thereafter that the work remained uncompleted." (139 Cal. 497.)

The court found "that on the fourteenth day of April, 1896, and not prior thereto, the said defendant, Adolph Sutro, caused to be placed in a conspicuous place on said structure a notice to the effect that he would not be responsible."

"The sole question relates to the construction to be given to section 1192 of the Code of Civil Procedure, which reads as follows: 'Every building or other improvement mentioned in section one thousand one hundred and eighty-three of this code, constructed upon any lands with the knowledge of the owner, * * * shall be held to have been constructed at the instance of such owner, * * * and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner * * * shall, within three days after he shall have obtained knowledge of the construction, * * * or the intended construction, * * * give notice that he will not be responsible for the same, by posting a notice in writing to the

effect, in some conspicuous place upon said land. * * *'' (page 498.)

It was held:

“The general purpose of the Mechanics’ Lien Law is to give to contractors, laborers, and materialmen a lien on the land improved as security for their labor and material. But the law also gives to the owner certain rights and privileges by which he may protect himself against the operation of such a lien. The law does not, and in fairness should not, make the land subject to the lien in any and every case of a building or other structure erected upon it.” (pages 498-9.)

The court decided that by posting the notice the owner complied with the statutes. Whether the posting was in time was the principal question involved. It was held that the interest of the owner was exempt and judgment in his favor was affirmed.

Ah Louis v. Harwood, 140 Cal. 500.

In this case an option to purchase was given to Harwood.

“It was provided that he should ‘work all the men practicable for water development’ and ‘certainly work himself and two men.’” (p. 502.)

The owners contended that their interest was not liable by reason of these provisions in the option, but the court held:

“The owner of the land cannot protect it from the statutory liens, except he give the statutory notice or some notice equivalent

thereto. An agreement with a lessee or conditional purchaser that improvements must be at his cost, and that the lessor or seller will not be liable for labor or materials, will not alone satisfy the statute or protect the land from the lien."

These principles were reiterated less than a year ago by the California Supreme Court sitting *en banc* in the case entitled

Harmon Lumber Co. v. Brown, 165 Cal. 193.

The lease there was practically identical with that before this Court. In it the lessee covenanted "that he would, with all reasonable dispatch, erect building improvements upon the demised premises. It was also agreed that all such improvements should at the expiration of the term, or sooner determination of the lease, become the property of the lessor." (p. 195.)

The owner failed to post a notice of nonliability. Upon this ground it was decided that his interest was subject to the lien. The provisions of the lease requiring the improvements on pain of forfeiture of the term were held merely to give constructive notice to the owner of the erection of the building.

"Under section 1192, as it read at the time of the transaction here in question, improvements erected upon the land of one who, although not in fact authorizing them, fails to give the required notice within three days after obtaining knowledge of the construction or intended construction, are deemed to have been constructed at the instance of the owner, and

his interest is made subject to liens." (pages 196-197.)

The decision in the case at bar is directly opposed to the construction by the California court of statutes which are duplicated in the Alaska Code. The resultant divergence is greatly to be deplored. It is a retrogression from the consistency of mechanic's lien systems in the west which has heretofore been maintained and of which the case of *Cascaden v. Wimbish* is an exponent.

The opinion of this Court cites in its support a decision of one of the California courts of inferior appellate jurisdiction:

Western Lumber Co. v. Merchants' Amusement Co., 13 Cal. App. 4; 108 Pac. 891.

This case does not in any way derogate from the theory of earlier and later decisions of the Supreme Court of California. The situation there was unique in that the owner of the land formed a corporation of which he had complete control, then made a formal lease to it and proceeded to make the improvements in its name. The owner and lessee were thus one and the same person. Defendant's brief has pointed this out and quoted from the opinion the following statement:

"The evidence justifies the finding that Gager (the owner) was himself merely using the corporation as an instrument to carry out the venture in which that body was engaged."

In view of this fact the decision could not have been otherwise. Else in any case an owner might

make a lease or a deed of a fractional interest to a man of straw and by building under the latter's name and posting the statutory notice exempt his interest from liens. There is no possible analogy between that decision and the case at bar. The former did not rest upon a covenant of the lessee to build—no such covenant appears to have been contained in the lease. The *bona fides* of the lease here has never been questioned. Owner and tenant were each acting in his own interest. Other than that arising out of the lease there was no relation between them whatever.

4. Same. Construction by South Carolina Court of Similar Legislation.

It is helpful to note the construction by the Supreme Court of South Carolina of two sections of the mechanic's lien system of that state which, though not identical, contains a basic statute and a provision for exemption of the owner's interest similar to those of Alaska. In

Metz v. Critcher, 68 S. E. 627,

the two pertinent sections of the laws of South Carolina are quoted as follows:

“Section 3008. Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, or repair of any building or structure upon any real estate, by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully act-

ing for, such owner, in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land.”

“Section 3011. The owner of any such building or structure in process of erection, or being altered or repaired, other than the party by whom or in whose behalf a contract for labor or materials has been made, may prevent the attaching of any lien for labor thereon not at the time performed, or materials not then furnished, by giving notice, in writing, to the person performing or furnishing such labor, or furnishing such materials, that he will not be responsible therefor.” (page 628.)

These statutes received the following construction:

“The meaning of the two sections construed together is that under section 3008 a lien may be put upon property for material or labor expended thereon, when the owner agrees or consents that it shall be so expended; but under section 3011, if the owner is not himself the party by whom or in whose behalf the contract for labor or material has been made, but has made himself responsible by the agreement or consent mentioned in section 3008, he may give notice that he will not be responsible for labor or material furnished after the date of such notice, and thus prevent his liability extending to labor or material furnished after that time.”

This construction is directly opposed to that given by the Court to the provisions of the Alaska Code. The statutes are sufficiently similar in meaning and purpose to make the South Carolina decision strongly persuasive authority here.

5. Same. The Minnesota Decision.

Of the other cases cited in the opinion of this Court in this connection there is but one from a jurisdiction whose statutes contain a nonliability provision.

Wallinder v. Weiss, 119 Minn. 412, 138 N. W. 417.

This case is concerned with a lease which gave permission to the lessee to make improvements. Notwithstanding, it was held that the interest of the owner was not subject to the lien because he posted a notice that he would not be responsible.

Certain remarks of the Minnesota court, made purely by way of *dictum*, are noticed in the opinion filed herein. But these cannot be considered applicable in the case at bar because the basic statute of Minnesota, which plays the same part as Section 262 of the Alaska Code, uses the term "authority" which is much broader in meaning than the word "instance." The Minnesota case, it will hereafter be shown, is devoted to a construction of the meaning and scope of that term.

The quotation contained in the opinion of this Court is said by it to have been made with reference to the liability of a lessor. An examination of the case discloses that the Minnesota court was reciting the language of the statute of that state concerning a vendor of real property.

"Said section 3509 covers sections 4 and 5 of said chapter 200, Laws 1889. The first part

of the section relates to the vendor's interest in an executory contract to convey, and it is entirely clear that such interest may be protected by posting or serving the written notice mentioned, unless the vendor has required the improvement to be made."

The statute provided further as follows:

"When improvements are made by one person upon the lands of another, all persons interested therein otherwise than as bona fide prior incumbrancers or lienors shall be deemed to have authorized such improvements, in so far as to subject their interests to liens therefor. But any person who has not authorized the same may protect his interest from such liens by serving upon the persons doing work or otherwise contributing to such improvement, within five days after knowledge thereof, written notice that the improvement is not being made at his instance, or by posting like notice."

The decision of the court was concerned with the liability of an owner who leased property for use as a theater, and agreed that the lessee could change and remodel the front of the building in such manner as was reasonably necessary and desirable for theater purposes. Under the provisions of the statute—that "any person who has not authorized" the improvements "may protect his interest from such liens" by the posting of a notice of nonliability in the property, the court held that the owner had not authorized the improvements. The scope of the term "authorized" is a broad one. It may without question be held to include the case presented by the facts at bar. "Authority" to make the alter-

ations was surely given by the lease in the Minnesota case, and it is surprising that the court there decided that they were not thus authorized by the owner. But the section of the Alaska Code is different and there is no room here for the application of the principle of the Minnesota case—surely none for an enlargement of its doctrine by analogy.

6. Same. Other Cases Cited Are Decided Under Statutes Which Are Distinguishable. New York Decisions.

The other cases cited by this Court are without exception from jurisdictions where there is no such statute as section 265 of the Alaska Code and 1192 of the California Code of Civil Procedure. But, disregarding this distinguishing feature and turning to these cases, it will be found that they are based upon mechanic's lien statutes whose language is different from that of the fundamental provision of the Alaska Code—Section 262—and for this reason they are not reliable authority in the case at bar. An examination of the opinion of the New York case cited and of others from that jurisdiction will serve as a demonstration. The opinion herein cites:

Jones v. Menke, 168 N. Y. 61, 60 N. E. 1053.

The statute of New York provided:

“Under the mechanic's lien law of 1885 (chapter 342) the interest of an owner of real property is chargeable with the value of work performed or materials furnished in the erec-

tion or repair of any building thereon when the same is so performed or furnished *with his consent.*”

It should be unnecessary to point out the plain difference between the meaning of this statute, which attaches liability to an owner who consents to the improvement, and the Alaska law, which requires the work to be performed at the owner's instance. But this distinction does not rest upon reason alone. It is no longer an open question. For it has been established by the highest court of the State of New York.

In 1877 chapter 379 of the laws of that state was practically identical with the provisions of the Alaska Code. It was provided:

“Every person performing labor upon, or furnishing materials to be used in the construction, etc., of any building, etc., shall have a lien on the same for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent.”

“The land upon which any building, etc., is constructed, etc., shall be subject to the liens if at the time the work was commenced or materials for the same had commenced to be furnished, the land belonged to the person who caused said building, etc., to be constructed, etc.; but, if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien.”

These were construed in:

Cornell v. Barney, 94 N. Y. 394,
which, quoting in part from the opinion, presented
the following facts:

“In June, 1877, the respondent Barney entered into an agreement with the defendant Salem, whereby he leased to Salem a lot of land, situate in the city of New York, to hold from that date for fifteen years from the first day of January thereafter, for the yearly rent, payable quarterly, of \$4,100, besides taxes and assessments, and Salem agreed before the first day of January to erect upon the lot a building which was to cost and to be fully worth the sum of \$50,000. Barney agreed to loan and advance to Salem from time to time during the progress of the building, the sum of \$25,000, no part of which, however, was to be advanced, except on the presentation by Salem, if required, of evidence that he had expended an equal sum upon the building. When the sum of \$25,000 had thus been fully loaned, Salem was to execute a mortgage upon his interest in the building to Barney to secure the payment thereof in annual payments. * * * During the continuance of the lease Salem was to keep an insurance against loss by fire upon the buildings upon the lot for the sum of \$50,000, and in case of loss the amount of the insurance money received was to be used in repairing, or rebuilding the buildings. In case Salem failed to renew the lease at the end of any term, or in case he failed to keep the covenants, and also at the end of the final term, the lot with all the buildings thereon was to revert to and become the absolute property of Barney, his heirs or assigns.” (pages 396-7.)

The plaintiffs furnished materials used in the construction of the building by the lessee, for which

they were paid \$1,500, leaving a balance due of \$4,000. For this a claim of lien was filed upon the lot and building.

The similarity of the provisions of the New York statute and of the facts of the case to those at bar is striking. The Alaska Code is substantially a replica; the facts there were much stronger against the owner than here. It was held that the owner's interest was not subject to the lien. A few extracts from opinion will serve to indicate the reasoning of the court:

“It is true that Salem covenanted with Barney to erect the building, and that Barney agreed to advance money to be applied toward the erection of the same, and that he was to have a mortgage on the same; yet the building was not erected for Barney, and was not, before the termination of the lease, to belong to him, and in no proper sense could the material furnished for the same be said to be furnished at his instance. * * *” (page 399.)

“The plaintiffs can have no lien under this section upon Barney's interest in the land, because he did not in any proper sense cause the building to be constructed. Within the meaning of this section the building must be constructed for and at the expense of the owner of the land or under contract with him. Salem caused this building to be constructed, and the plaintiffs could have a lien upon his interest in the land under his lease.”

The word of caution expressed in our brief as to the danger of following decisions of other jurisdictions unless their statutes are first consulted and found to be the same in meaning is voiced by the

New York court in reference to different legislation of that State:

“In construing the portion of this act now under consideration we are not much aided by a reference to other lien acts. The language giving the lien in this act has not the same scope as that contained in the act chapter 478 of the Laws of 1862, in which a lien is given where a building is erected upon land by the permission of the owner, or as that contained in the act chapter 489 of the Laws of 1873, in which a lien is given where a building is erected upon land with the consent of the owner, which acts came under our consideration in the cases of *Burkitt v. Harper* (79 N. Y. 273), and *Otis v. Dodd* (90 id. 336). The widely different language used in this act enacted subsequently to those acts must be held to indicate a different legislative purpose.” (pages 399-400.)

It is decidedly worthy of note that the case cited—*Otis v. Dodd*—is the authority on which is based the New York decision mentioned in the opinion of this Court—*Jones v. Menke*. It is also one of the cases the principle of which is announced by the quotation from *Cyc* in the opinion of this Court. It is plain, therefore, that these can have little weight here, since the same court has given a directly opposite construction to a statute which is substantially identical with Section 262 of the Alaska Code; under that statute alone—and without the aid of such a provision as Section 265—it has upon the same facts reached a decision directly opposed to that at bar.

7. Same. The Missouri Cases.

The opinion of this Court cites two Missouri cases decided by the Kansas City and St. Louis Courts of Appeal. The more recent of the two is:

Dougherty-Moss Lumber Co. v. Churchill,
90 S. W. 405.

The language of the opinion discloses that the test of liability of the interest of an owner whose tenant erects the improvements on the land is different than that prescribed by the Alaska Code. The Missouri court quotes from one of its earlier decisions as follows:

“The only fair and reasonable construction to be placed on this provision of the contract is that the purchaser was authorized and empowered by the vendor to enter into contracts with builders to furnish material and erect the buildings or any part thereof on the lots to which he had the legal title. It was within the expressed contemplation of the parties to the contract that the purchaser should proceed to erect the houses upon the lots of the vendor. By implications from the contract the vendor authorized the purchaser to employ builders, to furnish materials, and erect the buildings. The vendor by his contract has subjected the title to the lots to the lien of the plaintiff.”
(page 407.)

Moreover, the decision is based on the Illinois cases which, as will hereafter be shown, involve a statute which is utterly unlike Section 262 of the laws of Alaska.

The quotation by this Court from the opinion in *Lumber Co. v. Nelson*, 71 Mo. App. 110, also reflects this distinction. The interest of the owner of the land is subjected to the lien not because the improvements were made “at his instance” but merely because under the facts they “were made and furnished by his consent and for his benefit.”

Furthermore, the statutes of Missouri contain the following provision in section 21, chapter 195, Gen. St. 1865 (Wag. St. p. 911):

“every person, including all cestuis que trustent for whose immediate use, enjoyment or benefit any building, erection or improvement shall be made, shall be included in the words ‘owner or proprietor’ thereof under this chapter, not excepting such as may be minors over the age of eighteen years or married women.” (69 S. W. 306.)

This unique law, upon which all the Missouri decisions are based, renders them inapplicable here.

The facts of the Churchill case make this distinction even plainer. The lease merely gave permission to the tenant to make certain alterations, in the following terms:

“The lessee shall have the right to construct such stairways and box office therein as he may find necessary, and the lessee shall have the right to remodel and reconstruct the second and third floors.”

The decision thus goes too far. If it is to be followed here, it will result that in every instance where permission only to make improvements is

given by the lease this Court must hold that they are made at the owner's instance and subject his interest to a lien. Such, clearly, is not the meaning of the Alaska Code.

But the cases cited were decided by courts of inferior appellate jurisdiction between whose rulings upon many questions there has for years been notorious conflict. Their decisions should ordinarily be given careful scrutiny. This caution is particularly necessary in reference to the matters involved here, because the Supreme Court of Missouri has refused to take the extreme view announced by the Courts of Appeal, and has used language of contrary tenor. In the comparatively recent case, decided in 1902—

Winslow Bros. Co. v. McCully Co., 69 S. W.
304,

the Supreme Court had before it a claim of lien for materials furnished in the construction of improvements made by a lessee which was a corporation organized and maintained by the same persons who controlled the corporation which owned the property. In an extended opinion which ignores the earlier cases in the inferior courts the Supreme Court held that in view of the plain identity of owner and lessee the interest of the former in the fee was liable under the terms of the statute above quoted. But in reaching this conclusion the court laid down a rule which meets squarely the facts of the case at bar as follows:

“On the other hand, the mere fact that an owner consents to a tenant's making altera-

tions or improvements upon the demised premises, *nor the fact that the tenant has contracted with the owner to make certain improvements on the leased premises*, does not make the land or the landlord's interest in the land subject to a mechanic's lien; for in such cases the tenant acts for himself, and not as agent for the owner." (page 305.)

But of utmost importance is the very recent recession from its former views of the Kansas City Court of Appeals in a case decided in April, 1913, and entitled:

Dierks Lumber Co. v. Morris, 156 S. W. 75.

The lease contained the following provision:

"Section 4. The lessee further covenants and agrees to keep the improvements now on said property in good repair and that it will at its own cost and expense expend within the first year of this lease not less than the sum of five thousand (\$5,000.00) dollars for additions and improvements to the building on said demised premises, subject to the approval of lessor as to character of construction." (page 76.)

The statute was the same as at the time when the earlier cases had been decided. And yet after an exhaustive discussion of these cases and some from other jurisdictions, notably the Illinois authorities cited in the opinion herein, the court announces the following views:

"We have carefully gone through all of the cases cited by appellant, and find that in all of them there is either a statute which, by its peculiar terms, authorizes a lien against the freehold without reference to the question of

agency, or the facts were such as to make the owner of the freehold directly responsible for the improvements.

“On the other hand the principle is laid down that a provision in a lease expressly requiring the lessee to make specified improvements or repairs does not make the lessee, in so doing, the agent of the lessor, so as to bind the reversion of the lessor with a mechanic’s lien therefor. 20 Am. & Eng. Ency. of Law (2d Ed.); *Cornell v. Barney*, 94 N. Y. 394; *Rothe v. Bellingrath*, 71 Ala. 55; *Morrow v. Merritt*, 16 Utah, 412, 52 Pac. 667. It is true the text says there are decisions to the contrary, but those contrary decisions, without exception, in the facts stated, show either a participation by the lessor in the building in addition to the mere covenant in the lease, thus making the lessee actually the agent of the owner to erect the building, or that the case was decided under statutes which so defined the word ‘agent’ as to bring the person ordering the improvements within the meaning of that term.

“And it has been held that the fact that the lease requires the improvement to be made does not render the lessee a ‘contractor’ of the lessor. 20 Am. & Eng. Ency. of Law (2d Ed.) p. 320; *Block v. Murray*, 12 Mont. 545, 31 Pac. 550. So that we are constrained to hold that the mere inclusion in a lease of a covenant to improve and repair does not, of itself, make the lessee the ‘agent’ of the lessor, within the meaning of the mechanic’s lien statute.” (page 78-9.)

8. Same. The Illinois Cases.

The opinion filed herein contains a statement of the decision in

Crandall v. Sorg, 198 Ill. 48; 64 N. E. 769.

Another case from the same jurisdiction is also cited:

Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203; 58 N. E. 347.

But the Court has failed to note the terms of the statute involved in these cases which in Illinois plays the same part as Section 262 of the Alaska Code. It is so different from the latter that it will suffice to state it to demonstrate the error committed in applying the decisions of the Illinois court in the case at bar. Quoting from the opinion in the *Jones* case at 58 N. E. 349:

“Section 1 of the mechanic’s lien law of this state, in force June 26, 1895, (Hurd’s Rev. St. 1897, p. 1034), provides ‘that any person who shall by any contract with the owner of a lot or tract of land, or *with one whom such owner has authorized or knowingly permitted* to improve the same, furnish or specially manufacture and prepare materials, fixtures, apparatus or machinery for the purpose of, or in building, altering, repairing or ornamenting any house or other building, * * * shall be known under this act as a contractor and shall have a lien upon the whole of such tract of land or lot and upon the adjoining or adjacent lots of such owner constituting the same premises, * * * for the amount due to him for such material, fixtures, apparatus, machinery, services or labor, and interest from the date the same is due.’”

These decisions, therefore, cannot be of assistance in the construction of a statute of Alaska which gives a lien for the value of improvements made “at the instance of the owner.”

9. Same. The Washington Cases.

Two cases are mentioned from this jurisdiction:

Shaw v. Spencer, 57 Wash. 587; 107 Pac. 383;

Kremer v. Walton, 11 Wash. 120; 39 Pac. 374.

The decision in the latter is based particularly upon the fact that the cost of the structure was to be paid by the lessor by deduction from the rents, a feature which distinguishes the case from the one at bar.

“It is true that, by its terms, the building was to be erected and paid for by the lessee in the first instance; but the lessor was to repay to the lessee the cost thereof, and for this reason it must be held that he assumed the same responsibility that he would if he had let a contract to a stranger for the erection of the building, under conditions which required him to fully pay the cost thereof before having the right to demand any payment of the owner.” (page 375.)

In *Shaw v. Spencer* the court held that the leasehold interest of Spencer whose subtenant had made improvements and repairs was subject to the lien on the ground of estoppel. The sublease was made by the Spencer Company which was not connected with the record title. The labor and materials were obtained in the name of the Tivoli Catering Company. Spencer shortly thereafter organized a corporation under this name.

“He was about the building constantly as the work progressed, giving orders, paying bills

when necessary to retain the carpenters, assuring them that their bills would be paid, when they threatened to quit, etc.” (page 384.)

Under these circumstances the court held that Spencer was estopped by the conduct and course of dealing from claiming exemption from responsibility. Thus the case does not bear in any way upon the one at bar.

10. Same. Other Decisions Cited in the Opinion.

There are but two other cases cited in the opinion of this Court. They will now be considered.

Potter v. Conley, 83 Kan. 676; 112 Pac. 608.

The facts of this case distinguish it from the one at bar. Furthermore, the italicized statement in the opinion quoted below is in conflict with the decision of this Court. The lease there provided that any alterations of the structure should be made only with the written request of the owner and that the cost, when ascertained, should be deducted from the rent as it fell due. The court held:

“It is not enough, of course, that the lessor should merely know that improvements are being made by the lessee; *nor yet that he should have agreed with him that repairs or improvements are to be made by the lessee*, as that may be done for the convenience of the lessee, and not because of any benefit to the lessor or his property. If the lessee acts only for himself, no lien will attach to the property of the lessor. Here, however, the lessor specifically agreed that repairs might be made at his expense. The stipulation in the lease that the repairs might

be made and the costs taken out of the rentals was the equivalent of saying to the lessees, you may contract for repairs and have them made up at my expense. This was not only assent and acquiescence of the lessor in the making of repairs, but it gave express authority to the lessees to act for him in procuring them to be made, and at his cost. It was enough to constitute a contract with the lessor himself for the improvements provided for in the lease."

Whitcomb v. Gans, 90 Ark. 469; 119 S. W. 676.

Here also the lease contained a covenant that the cost of the improvements should be deducted from the rent. In view of this fact and of the terms of the statute of Arkansas which has no parallel in the Alaska Code, the interest of the owner was held responsible. The opinion reads:

"The statutes of this state provide that every person who shall furnish any material for any building, improvements, etc., on land or for repairing same 'under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee or contractor or subcontractor,' shall have a lien on the land and improvements. Kirby's Dig. Sec. 4970. It is also provided that 'every person, including cestuis que trust, for whose immediate use, enjoyment or benefit a building, erection or other improvement shall be made, shall be concluded by the words 'owner or proprietor thereof' under this act. Kirby's Dig. Sec. 4991."

11. Review of the Argument Thus Far.

Thus far, this argument has been devoted to an analysis of the cases cited in support of the construction by this Court of the mechanic's lien law of Alaska. Their value as authority can be determined only by an examination of the statutes upon which they are based. This has been undertaken and it has been demonstrated:

(a) That in none of the jurisdictions from which cases have been cited, except Minnesota, is there such a provision as Section 265 of the Alaska Code.

(b) That in Minnesota the basic statute which determines the liability of the interest of the owner is much broader than Section 262 of the Alaska Code; the case decided under it is therefore inapplicable here.

(c) That in the other states the same difference between the basic statute and Section 262 exists, it being sufficient, generally, to bind the owner's interest if he has given "consent" or "permission" to the erection of improvements, or they are made "for his benefit." Nowhere among these jurisdictions where, under facts similar to those at bar, the interest of the owner has been subjected to the lien, is there a statute which makes the "instance" of the owner the determining factor or uses language of similar meaning.

The constructive argument—to prove that under the facts and statute law at bar the owner's interest should not be bound—has thus far been represented by the following authority:

(a) A consistent line of California decisions applying the parallel statute to section 265 to facts identical with those at bar and permitting an owner such as defendant here to exempt his interest by posting a notice upon the land. Also a pertinent decision from South Carolina.

(b) A decision of the highest court of New York (where there was no nonliability provision) upon facts stronger against the owner and a statute identical with the basic section of the Alaska Code—262—which holds that improvements so erected are not made at the instance of the owner. It also points out the difference between the statute before it and one which binds the owner's interest where he merely consents to the construction and thus distinguishes an earlier New York decision in which a contrary result was reached and on which a case relied upon in the opinion of this Court is based.

12. Statement of Purpose of Argument to Follow.

With these as a beginning, it will now be the purpose of this argument to collect cases from jurisdictions in which, although there is no nonliability provision, the basic statutes are identical in language with those of the Alaska Code or so similar in meaning that the decisions under them are valuable authority here. In every case the statute will bear a closer resemblance to that of Alaska than those of states from which decisions are cited in the opinion of this Court. Under the same facts

as at bar it is decided without exception that the interest of the owner is not subject to the lien. It will therefore follow that the decision of this Court is opposed to the overwhelming weight of authority.

13. Cases Opposed to the Decision of This Court.

UTAH.

Morrow v. Merritt, 52 Pac. 667.

The striking identity between the facts and the statute involved in this case and those before this Court can best be shown by quoting from the opinion of the Utah court:

“The tenant also covenanted to expend \$2,500 in the erection of permanent improvements on the premises during the term, and, at its expiration, to deliver the same to the lessor, in as good repair as when delivered, reasonable wear from use excepted. It does not appear that Calder authorized Merritt to make the improvements at his expense, or to furnish the materials or to perform the labor for him. The relation of principal and agent did not exist between them. Did the covenant in the lease that the tenant should expend \$2,500 in permanent improvements on the premises give the contractor a lien upon the landlord’s interest in the property, for the price of the materials and the compensation of the labor in question, furnished at the special instance of the tenant? The answer depends upon the meaning of the following provisions of section 1, p. 44, Sess. Laws Ter. Leg. 1894: ‘Mechanics, material men, contractors, or sub-contractors or builders * * * performing labor upon or furnishing materials to be used in the construction, * * *

addition, or repair * * * of any building * * * shall have a lien upon the property upon which they have * * * performed labor or furnished materials for the value of such * * * labor done or materials furnished, *whether at the instance of the owner or any other persons acting by his authority or under him, as agent, contractor, or otherwise, for the work or labor done * * * or material furnished, * * * whether done or furnished * * * at the instance of the owner of the building * * * or his agent; provided, that a lien or liens shall attach only to such interest as the owner or lessee may have in the real estate.* Under this law the lien exists upon the interest of the reversioner when the materials are furnished or the services are rendered at his request, or upon the request of his agent or contractor. *The request of the tenant is not sufficient, though he has bound himself to make improvements.*" (pages 668-9.)

The court then distinguishes cases decided under statutes of other states, notably New York, and concludes:

"Doubtless, statutes of other states may be found giving a lien upon the interest of the lessor of land without a contract with him or his agent, when material or labor is furnished to the tenant, and employed with his consent in erecting buildings or making improvements on the land. But, as we have seen, the Utah statute, upon which the plaintiff must rely, requires the materials to be furnished or the services to be rendered upon the request of the owner of the land, or his agent, before the lien can arise upon his interest. The judgment is reversed, with costs."

MONTANA.

Block v. Murray, 31 Pac. 550.

A contract of sale was executed by the owner and Knight which contained the following stipulation:

“(2) That said Knight shall ‘sink, or cause to be sunk, in a good and workmanlike manner, the present discovery shaft of said lode, to a depth of 350 feet from the surface, 30 feet of which shaft (in addition to the 50 feet, more or less, now sunk), shall be completed during the month of January, 1891, and 30 feet additional during each and every month thereafter until the full depth of 350 feet is attained.
* * *.’”

“(7) ‘That all improvements which may be by the second party, (Knight) or by any one in his behalf, put upon said mine, shall become and remain a part and parcel of this mine itself, or pass with the mine if sold, or remain upon the mine, and become the property of the said parties, if the mine is not sold.’”

While not precisely the same as that of Alaska in that a lien is given generally for labor and materials, without regard to the “instance of the owner,” the mechanic’s lien laws of Montana contain a provision which is a reproduction of section 263 of the Alaska Code. Inasmuch as it is made the basis of the decision of the Montana court it may be quoted from the opinion:

“The statute relating to the subject provides ‘that the lien given by section 820 of this chapter shall extend to the lot or land upon which any such building, improvement, or structure is situate, * * * if the land belongs to the person who caused said building to be con-

structed, altered, or repaired; but, if such person own less than a fee-simple estate in such land, then only his interest therein is subject to such lien.' ”

It was held that interest of the owner was not subject to the lien. The contention that by the agreement Knight was constituted a contractor and could bind the owner's title was denied.

IDAHO.

Steel v. Argentine Min. Co., 42 Pac. 585.

A mining lease with option to purchase, providing for the operation of the mine by the lessees, contained the following stipulation:

“The parties of the second part further agree that, in working said mine, they will do so in economical and miner-like manner, and that all tunnels, drifts, shafts, and stopes therein shall be promptly timbered wherever necessary to preserve the work therein.” (page 586.)

While in possession the lessees became indebted for labor and materials used in working the mine for which a lien was claimed upon the interest of the owner. The statute provided:

“Every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of any mining claim, building, wharf * * * or who performs labor on any mining claim, has a lien upon the same for the work done or materials furnished by each respectively, whether done or furnished *at the instance of the owner of the building or other improvement, or his agent.*” (p. 586.)

The parallelism between this statute and section 262 of the Alaska Code is evident. Another provision of the Idaho law is precisely the same as section 263.

The contention of the owner was stated by the court as follows:

“It is claimed by appellant that none of the liens sought to be enforced in this action are valid or within the provisions of said section, in that none of the work or labor, nor any of the materials furnished, were so done or furnished for or at the request of the owner of said mine or its agent.” (p. 586.)

It was held that since credit was given, if at all, to the lessees, the argument of the owner was sound. The judgment was therefore reversed.

TEXAS.

Faber v. Muir, 64 S. W. 938.

A contract of sale was made by owner of the property with Muir. Quoting from the opinion:

“By the contract Muir agreed and obligated himself to build on said lot a one-story frame cottage of rooms, according to the plans and specifications to be thereafter made, and attached to and made a part of the contract. Muir also agreed to have said work commenced immediately after the delivery of the agreement, or as soon thereafter as practicable, and to have the same completed with as little delay as possible, free from any and all liens except a lien to be reserved by McKell for part of the purchase money.” (p. 939.)

The plaintiff performed the labor and furnished the material for the structure and sought to foreclose a lien against the property for an unpaid balance after Muir had abandoned his contract to purchase and the owner had rescinded it. The statute gave a lien where the work is done or material furnished "under or by virtue of a contract with the owner or his agent, trustee, receiver, contractor, or contractors."

It was held that the interest of the owner was not subject to the lien. The distinction is made between statutes such as that of Texas and others which provide that the consent of the owner is sufficient to express his interest with a lien. Cases from other jurisdictions are thus shown to be inapplicable.

NORTH CAROLINA.

Weathers & Perry v. Cox et al., 76 S. E. 7.

The lease was for the term of ten years and provided:

"* * * that the lessees were to construct or erect on the premises, for use in their business, a theater and auditorium, to cost not less than \$6,000, and a covenant, on the part of the lessees, that at the termination of the lease the improvements on the property should belong to the lessors, the owners of the property."

The lessee proceeded to make the improvements and this action was brought upon an unpaid claim of lien under a contract with the lessee, a corporation, which had become insolvent and forfeited the lease.

The statute provided:

“Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building may be situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts, contracted for work done on the same, or materials furnished.”

The court announced the following construction of the statute under its prior decision:

“the principle that the property of a lessor could not be held for the debt of the lessee, unless a contract to pay on the part of the lessor could be expressly shown or reasonably inferred from the circumstances.”

It thus appears that the facts of the case are identical with those at bar. The statute is not precisely similar, but under the interpretation of the court comes nearer that involved here than any of those in the cases cited in the opinion of this Court. It was held that the interest of the owner of the property was not subject to the lien. The court offers a valuable discussion of apparently conflicting decisions from Illinois, New York and Washington—some of which are considered above—pointing out the distinguishing features in the statutes of these states. The difference between the provisions of the two statutes of New York and the resultant divergence of decision which we have discussed above are also explained.

NEBRASKA.

Schrage v. Miller, 62 N. W. 1091.

The owner leased his property for a term of three years. Quoting from the opinion:

“Furthermore, the lessee agreed to put the sum of \$1200 cash in repairs on said premises, such as painting, papering, kalsomining, etc., but particularly to immediately paint veranda and front of hotel three coats, to be of lead and oil and first-class work and material, such expenses to be included in said outlay of \$1200.” (page 1091.)

The statute provided:

“Any person who shall perform any labor, or furnish any material or machinery or fixtures for the erection, reparation or removal of any house, mill, manufactory or building or appurtenance by virtue of a contract or agreement expressed or implied with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, building or appurtenance, and the lot of land upon which the same shall stand.” (58 N. W. page 200.)

A lien for labor and materials used in making the improvements was sought to be enforced. It was held that “the estate of the lessors was not bound.”

SOUTH DAKOTA.

Pinkerton v. LeBeau et al., 54 N. W. 97.

The owner entered into a contract of sale in which the purchaser agreed to construct an opera house on the property. The purchase price was payable in equal installments in one and two years respect-

ively. After the rough construction had been completed the vendee abandoned the contract. The plaintiff had furnished lumber for the building and claimed a lien upon the property. The court held that the contract did not

“constitute Le Beau the agent of Haft, within the spirit and intent of the statute, which provides that for material furnished or labor performed under a contract with the ‘owner, his agent,’ etc., the person performing such labor or furnishing such material shall have a lien upon the land, buildings, and improvements.” (page 99.)

The plaintiff was denied a lien upon the land; but under a statute similar to section 263 of the Alaska Code the lien was held to attach to the building.

VIRGINIA.

Atlas Portland Cement Co. v. Main Line Corp., 70 S. E. 536.

The lease in this case contained a stipulation whereby:

“the lessee agreed to erect and maintain at its own expense a building on the said lot at least two stories high, built of brick or stone, to cost when complete not less than \$125,000 (afterwards changed to \$90,000), the building to be commenced on or before the 10th of February following, and completed with all reasonable diligence and dispatch. The agreement further provided for keeping the property insured, and the payment of taxes, etc., by the lessee, and that if the lessee or its assigns or successors should at any time during the said term fail to keep the covenants of the lease on

its part for a certain period designated therein, the lessor, its successors or assigns, etc., had the right to enter upon the said premises.”

The lessee proceeded to construct a considerable part of the building but abandoned it before completion. The plaintiffs thereupon sought to lien the property.

The basic statutes of Virginia are precisely the same in meaning as those of Alaska. The court construed them as follows:

“it is clear, we think, that the interest of the lessor in the lot cannot be subjected to the liens of the appellants, unless the lessor caused the building to be erected on the lot.” (page 538.)

The verb “cause” is the determining term in section 263 of the Alaska Code which provides that the land on which the building is erected shall be subject to the lien if at the time

“the materials for the same had been commenced to be furnished the land belonged to the person who *caused* the building or other improvement to be constructed.”

Referring to the provision in the lease requiring the tenant to make the improvements, the court held:

“It is well settled that such relation does not make the tenant the agent of the landlord, and that it does not give him the implied authority to create a lien upon the landlord’s interest therein for improvements made thereon, unless the lawmaking power expressly or by necessary implication enacts otherwise. * * *

“The lessor in no way, directly or indirectly, contracted with the general contractor or the persons who did the labor or furnished the supplies. On the contrary, the agreements for its erection were between the general contractors and the lessee. Under these contracts, the work was done and the supplies furnished. The lessor was no party to those contracts, and the work was not done nor the supplies furnished at its instance or request. We do not think that, in any proper sense of the word ‘cause,’ as used in the statute, it can be held that the lessor caused the building to be erected.”

CONNECTICUT.

McGinniss v. Purrington, 43 Conn. 143.

A contract of sale of land was executed containing the following stipulations:

“And it is further understood and agreed between the said parties that the said Dillon shall, on or before said 1st day of January, 1874, build, construct and complete a house on said above described lot, together with a fence around said lot, and all the appurtenances and modern improvements necessary to render said house a first-class residence. * * * And it is further agreed that if the said Dillon shall fail to make the several payments, or any of them, or perform the said agreements and promises as herein before stated, he shall forfeit all claim to the premises described herein, and all moneys paid in pursuance of this agreement.” (pages 144-5.)

Plaintiff constructed the cellar of the dwelling. The vendee thereupon abandoned his contract of sale and plaintiff asserted a lien against the land. It was denied. The court held:

“It is true, as the plaintiff claims, that the language of the act of 1855, under which this application is brought, is very broad. It cannot however have been intended to create a lien against a party who has not, directly or indirectly, contracted for the work, and so become liable to pay for it.

“It is just and equitable that the plaintiff should be paid his debt, but not just that it should be collected, or fastened as a lien on the land, of one who does not owe it.” (pages 147-8.)

DISTRICT OF COLUMBIA.

Albaugh v. Litho-Marble Co., 14 App. D. C. 113.

The owner of the land leased it under an agreement which contained a covenant that the lessee

“would erect a building on the premises at his or their own expense at a cost of not less than seventy-five thousand dollars, which was to be surrendered to her, her heirs or assigns, at the end of the term, without charge to her or them, and in the meantime should be kept insured for her and their benefit in the sum of forty thousand dollars.” (p. 114.)

The plaintiff sought to impose a lien on the owner's interest for work and materials used in the improvements constructed by the lessee. The statute provided:

“Sec. 1. Every building hereafter erected or repaired by the owner or his agent in the District of Columbia, and the lot or lots of ground of the owner upon which the same is being erected or repaired, shall be subject to a lien in favor of the contractor, subcontractor, mate-

rialman, journeyman, and laborer, respectively, for the payment for work or materials contracted for or furnished for or about the erection, construction, or repairing of such building,
* * *

“Sec. 4. * * * When a building shall be erected or repaired by a lessee, or tenant for life or years, or a person having an equitable estate or interest in such building or the land on which it stands, the lien created by this act shall only extend to and cover the interest or estate of such lessee, tenant, or equitable owner.” (31 App. D. C. page 414.)

The plaintiff contended that the lessee's act bound the owner by reason of the terms of the lease. But the court held:

“* * * the proposition is wholly untenable. * * * The parties to the lease dealt with each other, not as principal and agent, but practically as adverse parties. To hold that a lessor, covenanting that a lessee for the security of his interest under the lease, the payment of rent, probably, should construct a building upon the land in place of one to be demolished, would thereby and by virtue of such a covenant make the lessee his agent and bind himself personally, as well as his property, for the contracts of the lessee in the performance of the covenant, seems to us to be wholly without warrant either in law or in reason;” (page 120.)

14. The Equity of the Situation.

In construing and applying the statutes of Alaska the Court refers to events which occurred subsequent to the construction of the building—the lessees' abandonment and Borden's possession of the

premises. In this way a false quantity has been injected into the argument. For the rights of the parties are to be determined by conditions as they were at the latest when the plaintiff filed its claim of lien. Subsequent matters are not material in the construction of the Alaska statutes. That the lease or contract of sale in the cases cited above was forfeited, did not lead to the conclusion that the owner's interest was bound.

However, the true situation has not been perceived. Borden has not prospered by reason of the default of his lessees. The period of increased rentals was short; in March, 1912, the building became vacant (Trans. p. 136). It remained so; the record shows that it was unoccupied at the time of trial (Trans. p. 194). Clearly, Borden has suffered by the loss of a continuous tenancy of five years at a monthly rental of seventy-five dollars. Instead he has on hand a property which will not bring on the market a price equal to the amount of the decree which plaintiff demands.

15. The Direction for a Decree for Plaintiff.

It appears plainly from the record that the cause was tried by counsel on both sides as well as the judge upon the theory that section 265 of the Alaska Code was applicable. Whether Borden properly complied with its terms was the mooted question to which the greater part of the testimony was directed. Neither side anticipated a ruling denying Borden

the privilege of exempting his interest by notice. It was generally assumed without question that such was his right. But this Court has held that under the facts disclosed by the record Borden's interest was lienable and his notice of nonliability futile. Neither side, we believe, sought to adduce every factor relevant to this issue—whether the building should be considered to have been constructed at the instance of the owner—an issue which this Court has decided against the defendant. We know that Borden's case on this point has never been fully presented. The attitude of plaintiff's counsel at the trial and the contents of the record lead to the same conclusion in regard to plaintiff. The result is that as the basis of its decision this Court has used facts the presence of which is purely fortuitous and which were not adduced in evidence because relevant to that issue, but were so adduced utterly without the expectation that they were to be considered upon appeal in reference to that issue. The opinion contains among other factors leading to the decision on this point the statement that plaintiff had "furnished one-third of the lumber before it received actual notice that Borden disclaimed liability for the cost of the building." Except that the proportion is nearer one-fourth, there is nothing in evidence to the contrary. But the fact was that it was a matter of general knowledge in the small town of Cordova that Borden had leased his lot and that the improvements were to be made without any cost or liability

on his part. Mr. Stewart, plaintiff's manager, had personal acquaintance with the situation; he had sold the lumber used in the foundation; actual notice of all these facts from the beginning could easily be brought home to plaintiff. Aside from the fact—pointed out in the brief—that plaintiff received from the lessees nearly three hundred dollars more than the price of the lumber delivered at the time when Borden told Stewart that he had posted a notice of nonliability; aside from this, Borden cautioned Stewart against giving credit to the lessees, but Stewart assured him that they were responsible parties. These and many other matters of similar import were not presented because under the accepted issues in the case they were immaterial. It would seem, therefore, that the cause should be remanded for a retrial, at least, of this issue.

But to the order of reversal there was added a direction for a decree for plaintiff “in accordance with the finding as to the amount due it.” It is submitted that this feature of the order should be omitted not only for the reasons already advanced but also because there is nothing in the record upon which to base it.

16. Same. There Is No Finding of the Amount Due Plaintiff.

The direction was made evidently in the belief that there was a finding made by the trial judge of the amount due plaintiff. This is plainly an

inadvertence. The answer denied the allegations of the complaint that plaintiff had furnished lumber for the building, its reasonable value or agreed price, and denied that any sum whatever was due plaintiff (Trans. p. 12). The court found that the lumber used had been purchased from plaintiff (Trans. p. 20), but there is no finding as to price or reasonable value, or any amount whatever due plaintiff. For this reason, therefore, there must be a retrial.

17. Conclusion.

It may be that the matters considered in this petition did not receive adequate discussion in the briefs. Plaintiff's absence from court on the day set for hearing left no course open to defendant but to submit the cause without oral argument. We believe that the case and the decision have thereby suffered. One result was that the facts upon which the finding of completion of the building was based were not given the full and fair consideration by this Court to which defendant was entitled. Another result was that neither the facts of this case nor the value as authority of the decisions of other states in the light of the statutes involved were thoroughly scrutinized. With all respect, we believe we have demonstrated these things. The length of this petition is to be regretted but was not to be avoided. We believe that it has shown the necessity of a rehearing.

J. C. CAMPBELL and

DAVID L. LEVY,

Solicitors for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the solicitors for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and is not interposed for delay.

DAVID L. LEVY,
Solicitor for Appellee and Petitioner.

